In the Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

JOINT MOTION FOR LEAVE TO FILE STIPULATION AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

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No. 31, Original

STATE OF UTAH, PLAINTIFF

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ON BILL OF COMPLAINT

JOINT MOTION FOR LEAVE TO FILE STIPULATION

The State of Utah and the United States jointly move the Court for leave to file their stipulation dated March 29, 1968, a copy of which is attached, and, if the stipulation is construed to work an amendment of their respective pleadings, then so to amend said pleadings.

PHIL L. HANSEN,
Attorney General of the State of Utah.

ERWIN N. GRISWOLD,
Solicitor General of the United States.

MAY, 1968.

306-636—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE STIPULATION

On March 29, 1968, the State of Utah and the United States, presently the only parties to this action, entered into the attached stipulation, submitting it to the Special Master and serving copies on potentially affected applicants for intervention, Morton International, Inc., and Great Salt Lake Minerals & Chemicals Corporation. Subsequently, on April 22, 1968, printed copies of the stipulation, including one bearing the manuscript signatures of the Attorney General of Utah and the Solicitor General of the United States, were deposited with the Clerk of this Court. At the suggestion of the Special Master, we are now formally seeking leave to file the stipulation, with a request

that the present motion be referred to the Special Master.

This procedure seems appropriate in light of the fact the stipulation may be viewed as effectively amending the prior pleadings of the parties, action which may require leave of Court under Rule 15 of the Federal Rules of Civil Procedure, arguably applicable to this case by virtue of Rule 9(2) of the Rules of this Court. While the Court's order of June 12, 1967 (388 U.S. 902) might be viewed as authorizing the Special Master to act initially without further order of the Court, the intervening orders of October 23, 1967 (389 U.S. 909) and March 11, 1968 (390 U.S. 977), expressly referring other motions to the Special Master, suggest a like course in this instance.

Respectfully submitted.

PHIL L. HANSEN,
Attorney General of the State of Utah.

ERWIN N. GRISWOLD,
Solicitor General of the United States.

MAY, 1968.

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IN THE

Supreme Court of the United States

No. 31, Original.

October Term, 1967.

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

REPORT OF SPECIAL MASTER.

J. CULLEN GANEY,
Senior Circuit Judge,
Special Master.

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IN THE

Supreme Court of the United States.

No. 31, ORIGINAL

OCTOBER TERM, 1967

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

REPORT OF SPECIAL MASTER.

To the Chief Justice and Associate Justices of the Supreme Court of the United States.

Pursuant to the orders of the Court entered on June 12, 1967 (388 U.S. 902), October 23, 1967 (389 U.S. 909), March 11, 1968 (390 U.S. 977), and March 29, 1968 (— U.S. —), your Special Master submits the following report and recommendations:

I.

SUMMARY OF RECOMMENDATIONS.

(a) The parties should be granted leave to file their Stipulation of March 29, 1968, with the omission of the second sentence of Paragraph 2 and the word "Should" in Paragraph 3 of the Stipulation; as the Stipulation will then read, there is put in issue the title to the brines and minerals in solution, and this matter is, accordingly, not left to the whim of the United States to assert title at some later date. It is with these omissions, in the Stipulation, incumbent on the State to presently establish superior title to the covered and uncovered land and the brines and minerals in solution and pay the fair market value thereof in accordance with Public Law 89-441,

(b) The motion of Morton International, Inc., to intervene as a defendant and answer should be denied on the ground that the State of Utah has not consented to sue that corporation in this action. If the motion is interpreted as also seeking leave to file a cross-claim against the United States, since the prayer for relief of its proposed Complaint states that the United States is without any right or title to the relicted land and bed of the Lake, such motion should be denied for it would be suing the United States without Constitutional authority,

(c) That portion of the supplemental motion of Great Salt Lake Minerals & Chemicals Corporation to intervene, in the alternative, as a defendant, and its answer should be denied for the same reason as stated in the first sentence of (b) above,

(d) The motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a plaintiff, and its Com-

plaint should be denied on the ground that this Court is without original jurisdiction to entertain a controversy between a private corporation and the United States,

(e) The remaining portion of the supplemental motion of Great Salt Lake Minerals & Chemicals Corporation to intervene, in the alternative, as a defendant, and its cross-claim (against the United States) should be denied for the reason stated in (d) above, and additionally if it may not be a party, it may not file a cross-claim,

(f) The Court should not dismiss the Complaint on "indispensable" party grounds, and

(g) The Court should not refuse to exercise jurisdiction over this action, and thus permit the State of Utah and the United States to proceed to the merits of this action.

II.
INTRODUCTION.

The civil *in personam* action here involved is being brought by the State of Utah for the purpose of having the Court adjudicate conflicting claims between it and the United States to certain land within the meander line[1] of the Great Salt Lake, the bed and minerals in solution in the Lake. The State of Utah seeks to quiet its alleged title by a judicial determination that title to this land, with certain exceptions, belongs to it and that the United States has no right, title or interest in it or the minerals in solution. The action was instituted pursuant to Article III, Section 2, Clause 2, of the Constitution of the United States, and § 5(b) of the Act of June 3, 1966, 80 Stat. 192 (Public Law 89-441, § 265), which is entitled "An Act to authorize conveyance of certain lands to the State of Utah based upon fair market value." Section 6 of the Act has been amended by the Act of August 23, 1966, 80 Stat. 349.

Morton International, Inc. ("Morton"), a Delaware corporation, seeks to intervene in this action as a *party defendant*.

Great Salt Lake Minerals & Chemicals Corporation ("M & C Corporation"), likewise a Delaware corporation, has also sought to intervene as a *party plaintiff*. It has filed a supplemental motion to intervene, in the alternative, as a *party defendant* in order to assert its defense against the State of Utah and its claims against the United States via a *cross-claim*.

The State of Utah opposes the motions to intervene. The reasons given is that it has not consented to sue, or be sued by, the would-be intervenors in this action. However,

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1 A line representing the mean high-water mark of a body of water at a certain date.

under the Complaint the United States did not object to the intervention of Morton, but did object to M & C Corporation's intervention.

After the parties sought leave to file a Stipulation on March 29, 1968, the United States objected to the intervention of Morton, and also to that of M & C Corporation, regardless of its status as a fee owner or lessee. The would-be intervenors see no change in their positions even though the Stipulation requires only that as between the United States and Utah, the State of Utah must establish a superior title to lands against the United States.

For a proper understanding of the questions raised in this action, it may be appropriate to set forth some "historical" background and a brief summary of the proceedings so far.

III.

BRIEF BACKGROUND.

On September 9, 1850, the land which was to become the State of Utah was established as the Territory of Utah. 9 Stat. 453. The constitution and laws of the United States were declared to be in force in the Territory "as far as may be applicable." On January 4, 1896, by Presidential Proclamation (No. 9), 28 Stat. 876, pursuant to the Utah Statehood Enabling Act of June 16, 1894, 28 Stat. 107, setting forth the conditions entitling the people of the Territory to become a State, that Territory was proclaimed a State and admitted into the Union "on an equal footing with the original States." At that time the United States was the owner in fee of all the uplands of the Lake, with the exception of those portions which it had transferred to private interests by patents prior to that time.

As set forth in the Memorandum of the United States, February 7, 1968, p. 1, "Before then, beginning in the 1850's, various portions of the lands adjoining Great Salt Lake have been surveyed, with a meander line approximating the shore of the Lake as it then existed. Although the level of the Lake has fluctuated over the years, its general trend has been downward. As a result, the meander lines, drawn for the most part years ago, are in some cases thousands of feet, and in other cases several miles, inland of the present waterline of the Lake. Ownership of the land, estimated to be 600,000 acres, known as relicted land, between the water's edge and the old meander line has been a source of dispute and is the principal subject matter of this controversy."

1. The State of Utah claims that on January 4, 1896, the date it was admitted to the Union, the Great Salt Lake

was a navigable body of water. On the basis of this fact and the "equal footing doctrine",[2] it asserts that it is the owner of the Lake's bed as delineated and determined by the official surveyed meander line and that the land (some 600,000 acres) left exposed by the recession of the Lake between the water's edge and the meander line, known as "public domain reliction", is part of that bed. By reason of its claim, the State of Utah, in addition to having sold some of that land, leases other portions of the land and grants licenses to extract minerals from the Lake to private interests.

2. The United States claims, excluding those exposed lands lakeward from the upland[3] transferred to patentees, title to a substantial portion (some 325,574 acres) of the

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2 Starting with the case of *Martin v. Waddell*, 16 Peters (41 U.S.) 367, 410 (1842), the Court said: "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. . . ." The case of *Pollard v. Hagan*, 3 How. (44 U.S.) 212, 229-230 (1845) announced the "equal footing" doctrine. The facts were as follows: Plaintiff, a patentee of the United States for the premises in question, brought an ejectment action in an Alabama State Court. The defendant in possession, who traced his title to a Spanish grant, offered evidence that the premises, between 1819 and 1823, were covered by waters of the Mobile River at common high tide. The Court charged the jury that if they believed the premises were below the "usual high water-mark" at the time Alabama was admitted into the union, then the patent could give no title. A verdict and judgment in favor of defendants was affirmed by the Supreme Court of Alabama. In affirming and holding that Congress had no power to grant to plaintiff the land in controversy, this Court stated the following propositions (44 U.S., at 230): "First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states." Also see *United States v. Utah*, 283 U.S. 64, 75 (1931), and cases therein cited in footnote 4.

3 Uplands are lots above and adjacent to the meander line.

exposed lands (known as "public domain reliction" lands) claimed by Utah as part of the Lake's bed. The basis for this claim is that it was the original owner of the uplands and for that reason it is entitled to the exposed lands under the common-law doctrine of reliction.[4]

3. Private vendees or patentees of the Lake's uplands whose interest can be traced to the United States claim all the land lakeward fronting such uplands. Their claims do not stop at the water's edge but continue to the thread of the Lake. They contend that the patents impliedly passed title to the relicted land to the owner of the adjoining uplands. The combined area of the exposed land claimed by this group amounts to approximately 275,000 acres. Morton is a good example of one of this group.

4. In addition, however, the United States also claims the relicted land fronting the uplands of some of the patentees (or those claiming through them) under the so-called Basart doctrine.[5] The total area claimed under this doctrine is approximately 108,780 acres, and is referred to as "public land reliction under Basart." These private owners, of course, disagree that the Basart doctrine is applicable to these lands.

5. Lessees of the State of Utah over relicted lands,[6] some of whom have acquired licenses and permits to extract

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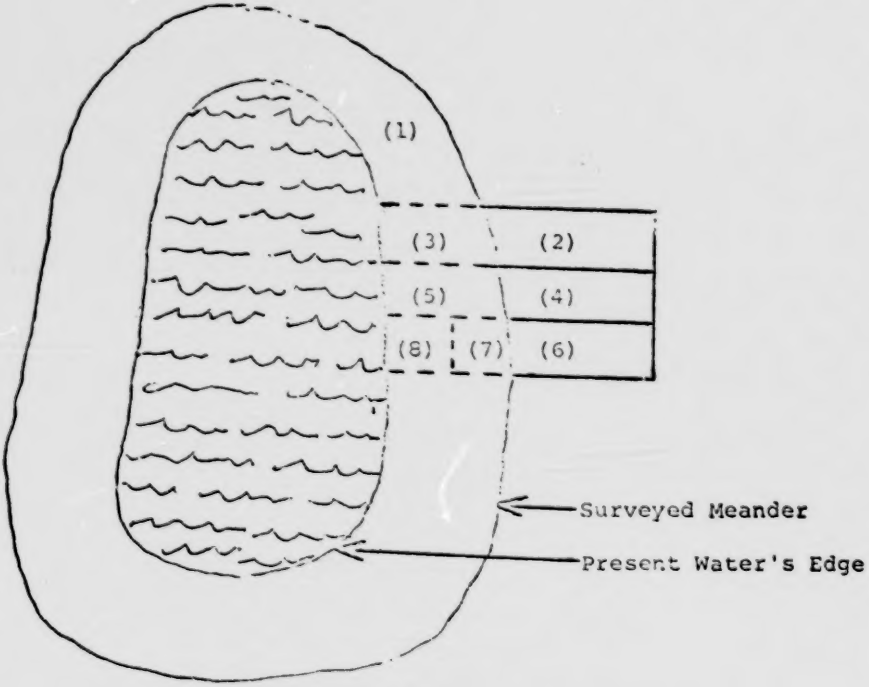
4 See *State of Utah*, 70 I.D. 27 (1963).

5 See *Madison v. Basart*, 59 I.D. 415 (1947), a case in which the United States Department of Interior ruled that where a substantial accretion had formed between the meander line and the shore line of the Missouri River at the time of the grant of a patent to a lot of public land abutting on a meander line, title to the accreted land did not pass under the patent.

6 By statute, the State of Utah provides that all mineral deposits, and salt and other minerals in navigable waters, are reserved to the state and shall be sold only upon a royalty basis. See 1967 Pocket Supp. to Replacement Vol. 7 Utah Code Ann. § 65-1-15.

ILLUSTRATIVE DIAGRAM



EXPLANATORY:

The various classifications of exposed land around the Great Salt Lake can be demonstrated by the numbered areas above as identified by the description of each area as set forth below. The estimated acreages are rough approximations, and the actual acreages would vary from day to day and from month to month with the fluctuating water level of the lake.

(1) Belt of approximately 600,000 acres of exposed land circling the lake, situated between present water's edge and surveyed meander line .

(2) Fee land where ownership retained by the United States.

(3) Claim of United States to 325,000 acres as direct reliction land.

(4) Fee land patented to private person when water's edge was at or near surveyed meander.

(5) Claim of private persons to 167,000 acres as direct reliction lands—not in issue in this litigation.

(6) Fee land patented to private person when water's edge was substantially below surveyed meander.

(7) Substantial land exposed at date of patent. Broken line between (7) and (8) represents water's edge at date of patent.

(8) Land exposed since date of patent. Total land in (7) and (8) combined represents about 108,000 acres, is claimed by both United States and private claimants, and is the only category of land which creates the indispensable party question.

[*Reproduced from the "Brief of State of Utah in Response to the Reply Brief of the United States, Etc."*]

the minerals from the Lake, would be expected to favor the State in a legal controversy over title to the lands and the minerals in solution. M & C Corporation is a good example of one of this group.

The exposed land in dispute is of little value except for ingress and egress to and from the Lake and for use in mineral extraction. It is the minerals and the brines in solution in the waters of the Lake which have a substantial value if the same can be extracted, processed and marketed. The State of Utah is anxious to establish a mineral extraction industry by private interests on the shores of the lake.[7] Such an industry cannot proceed to its fullest extent as long as a dispute between the United States and the State of Utah over title to the derelicted land exists.

Attempts to settle by legislation the controversy between the United States and the State of Utah resulted in the passage of the Act of June 3, 1966 (80 Stat. 192), heretofore referred to.

The Legislature of the State of Utah has "authorized and directed" the Governor of that State, "with the concurrence of the State land board to elect whether to litigate the conflicting claims of the United States and the State as to the bed of the lake or to accept and pay without litigation the fair market value fixed by the secretary of the interior without litigation." Act approved June 6, 1966 (2nd Spec. S.), ch. 11, § 5, 7 Utah Code Annotated (1953), § 65-95 (1967 Cum. Supp.).

On March 1, 1967, the Attorney General of the State of Utah filed in the Court a Motion for Leave to File a Complaint; the Complaint accompanied the Motion. The only defendant named in the Complaint is the United States of

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7 This interest has been asserted by the Legislature of the State of Utah. See 1967 Pocket Supp. to Replacement Vol. 7 Utah Code Ann. § 65-9-3.

America. On May 15, 1967, the Court granted the State of Utah's motion (387 U.S. 902), and on June 12, 1967, appointed me as Special Master. 388 U.S. 902.

On June 15, 1967, the United States is purported to have conveyed by quitclaim deed [8] all of its rights, title and interest to the land and the minerals in solution in the Lake to the State of Utah, but reserving the right to all minerals in the land together with the right to prospect for, mine and remove the same in the excluded land. (See §§ 2 and 3 of P.L. 89-441.)

On July 14, 1967, the United States filed an Answer to the State of Utah's Complaint.

On September 18, 1967, Morton filed its Motion for Leave to Intervene *as a party defendant* in the original action. Its proposed Answer to Utah's Complaint accompanied the motion. On October 23, 1967, the motion for leave to intervene and file an answer was referred to the Special Master. 389 U.S. 909. In November of 1967, the United States responded that it had no objection to the intervention of Morton in this action.

On or about January 24, 1968, M & C Corporation filed its motion for leave to intervene *as a party plaintiff*. Its proposed Complaint accompanied the motion. Thereafter, on or about February 18, 1968, M & C Corporation filed a Supplemental Motion to Intervene, in the alternative, as *a party defendant*. Its proposed Answer and Cross-claim accompanied the motion.

On or about March 11, 1968, the Court referred M & C Corporation's motion to the Special Master for a report and

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8 "A deed of conveyance operating by way of release; that is, intended to pass any title, interest, or claim which the grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title." Black's Law Dictionary (4th Ed.).

recommendation which is to also include Morton's motion. 390 U.S. 977.

Certain questions relating to intervention of Morton and M & C Corporation having been raised by the State of Utah, all counsel were requested by the Special Master to address themselves to certain issues.

On January 8, 1968, a hearing was held before me in the Attorney General's office, State Capitol Building, Salt Lake City, Utah. Present were: Martin Green for the Department of Justice; Phil L. Hansen, Richard L. Dewsnup, Dallin Jensen for the State of Utah; Frank A. Wollaeger, Martin Jacobs, Stephen B. Nebeker for Morton International; George E. Boss, Robert Thurman for Great Salt Lake Minerals and Chemicals Corporation.

On February 9, 1968, there was a hearing before me in the West Conference Room of the Supreme Court Building, Washington, D.C. In attendance were: Erwin N. Griswold, Solicitor General of the United States; Louis Claiborne, Assistant to the Solicitor General; Clyde O. Martz, Assistant Attorney General; David R. Warner, Chief, General Litigation Section; Martin Green, Department of Justice; Phil L. Hansen, Attorney General of the State of Utah; Richard Dewsnup, Special Assistant to the Attorney General of the State of Utah; Charles R. Hansen, Director, State Land Board; D. W. Jensen; Frank A. Wollaeger and Myer Feldman, Morton International, Inc., George E. Boss and William Rogers, Great Salt Lake Minerals and Chemicals Corporation; and Mr. Garner, Dow Chemical Company.

On March 29, 1968, after much argument and correspondence, the Attorney General of Utah and the Solicitor General of the United States agreed on a Stipulation (See Appendix, pp. 67-72, which they contend eliminates many of the issues raised by the would-be intervenors. In May of 1968, the parties filed a joint motion for leave to

file the Stipulation or to Amend the Complaint, and on June 3, 1968, the Court referred the joint motion to the Special Master. — U.S. —.

On April 26, 1968, a third hearing was held in Washington, D.C.

IV.

JURISDICTION OF THE ORIGINAL ACTION BETWEEN THE STATE OF UTAH AND THE UNITED STATES.

The judicial power that the people conferred on the Supreme Court and the federal judiciary which the Congress might ordain and establish from time to time is found in Article III, § 2, of the United States Constitution.

The original jurisdiction of the Court extends to actions by a state against the United States with the consent of Congress. *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *New Mexico v. Lane*, 243 U.S. 52 (1917); *Minnesota v. United States*, 305 U.S. 382, 387 (1939). Absent the consent of Congress the United States is immune from suit. *Kansas v. United States*, 204 U.S. 331, 341-342 (1907). This is an action by a State against the United States and in § 5 of Public Law 89-411 (S-265), 80 Stat. at 195, the Congress has given the consent of the United States to be joined as a defendant to an action before this Court.

The judicial power conferred by Article III, § 2, may be exercised only when a party asserts a claim ("case" or "controversy") in the form prescribed by, or acceptable to, the Court. See *Osborn v. United States Bank*, 9 Wheat. (22 U.S.) 737, 818 (1824).

Rule 9(2) of the Rules of the Supreme Court of the United States[9] adopted June 12, 1967, effective October 2, 1967 (388 U.S. 927-991), provides:

> "2. The form of pleadings and motions in original actions shall be governed, as far as may be, by the

9 The Supreme Court of the United States has the power, without further Act of Congress, to regulate the form and mode in which original actions shall proceed and be exercised. See *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793); *Kentucky v. Dennison*, 24 How. (65 U.S.) 66, 96-98 (1861).

Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court." (388 U.S., at 937)

This rule is applicable to this case even though it became effective after the State of Utah filed its motion for leave to file a complaint and entered an appearance. The rule is identical to its counterpart of the Rules promulgated April 12, 1954, effective July 1, 1954, 346 U.S. 955. Those rules have been rescinded. Rule 9(2) thereof has not been revised or amended in the interval between July 11, 1954, and October 2, 1967.

Rule 7 of the Rules of Civil Procedure lists the pleadings allowed and the form of motions, and Rule 8, thereof, provides for the general rules of pleading.

"Rule 8. General Rules of Pleading.

"(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * *

"(e) Pleading To Be Concise And Direct: Consistency.

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

"(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

. . . . . ."

We therefore look to the State of Utah's complaint.

(a) Summary of Allegations of Complaint.

This pleading, consisting of five numbered paragraphs and a prayer for relief, sworn to by the governor of the State, sets forth in its introductory part that the State of Utah, by its attorney general, brings this action "in equity" against the United States. The authority for the Court's jurisdiction appears in the first paragraph. In the second paragraph it is averred that the State of Utah and the United States are claiming ownership interest in the same land area, and that the United States consents to be sued in this action to determine what interest it has in the land area, and that the State has formally elected to maintain this action. A map, prepared by the United States Department of the Interior, and generally identifying the lands in question, is attached to the Complaint as Exhibit A. The legal and factual basis of the State of Utah's claim is set forth in the third paragraph. There it is averred that the Great Salt Lake, wholly within the State, has been a navigable body of water since January 4, 1896, and that the

official meander line represents the mean high-water mark of the Lake's bed as it existed at the date of survey and at the date of Utah's Statehood, and that by virtue of the navigability of the Lake and its admission into the Union on an equal footing with all other states, the State of Utah became the owner of the Lake's bed as delineated by the official surveyed meander line and all the minerals within the waters and bed of the Lake. The fourth paragraph declares that since Statehood, Utah has administered the land "constituting the bed of the Lake" and has invested millions of dollars in the development and improvement of it, and has granted leases covering, much of the land, and that the United States first asserted a claim to part of the land in 1959 even though it has recognized the State of Utah's title earlier by purchasing some of the land from the State prior to that time. The last paragraph asserts that the State of Utah has suffered irreparable injury as a result of the claims and actions of the United States and will continue to do so until such claims and actions cease. This is so, assertedly, because the minerals and brine in the waters of the Lake have a substantial value if they can be extracted, processed, and marketed, that it has issued a number of mineral leases and the mineral industry is important to the economy of the State, which industry requires the use of the exposed portions of the bed for the mineral extraction; that such industry cannot proceed until there is certainty of title to the exposed portions of the bed; and that the claims and actions of the United States have "impaired, hampered, frustrated and prevented" the State of Utah and its lessees from proceeding with mineral extraction, and cast a cloud on the ownership of the State as to all portions of the bed; and that "the State of Utah has no adequate remedy at law."

The prayer for relief asks for a decree quieting title in the State of Utah as against the United States regard-

ing the bed of the Lake and the minerals located therein, that the Court appoint a master to hear all admissible evidence and make findings and recommendations to the Court.[10]

(b) "Case" or "Controversy".

Article III, § 2, limits the exercise of the federal judicial power to "cases" and "controversies". See generally: *Osborn v. United States Bank*, 9 Wheat. 738, 819; *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-241 (1937); *Nashville C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249 (1933). In my opinion, the complaint presents a case or controversy within the meaning of the Constitution. *Minnesota v. Hitchcock*, supra, 185 U.S. at 382; *Texas v. Florida*, 306 U.S. 398, 406 (1939). Also see *United States v. Utah*, 283 U.S. 64, 75 (1931); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

(c) Real Party in Interest.

The complaining state must be the real party in interest (*Kansas v. United States*, 204 U.S. 331 (1907)), and the Court will not permit the action to proceed when it appears that the complaining State is actually suing on behalf of private interests. *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *Arkansas v. Texas*, 346 U.S. 368 (1953). From the record before me it appears that the State of Utah is the real party in interest in this action.

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10 "In its answer, the United States denied the State of Utah's allegations of ownership of the lands described in Exhibit A, admitted that the United States claims to own those lands, and prayed for an adjudication confirming and establishing that it is the owner of all right, title, and interest in those lands. The answer further prayed that the Court declare that the sole right of Utah is 'to have those lands conveyed to it by the United States, and to pay for them in accordance with the provisions of the Act of June 3, 1966, as amended.' (Answer, p. 3)." See Morton's motion to intervene, p. 2.

V.

IS THIS AN ACTION WITHIN THE AUTHORITY OF PUBLIC LAW 89-441?

It is claimed that the Complaint of the State of Utah, as allegedly narrowed by the stipulation, does not meet the requirements of the type of action to which Congress gave consent to join the United States.

It was early recognized by the Court, "as the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some Act of Congress, or the court cannot exercise jurisdiction over it." *United States v. Clarke,* 8 Pet. (33 U.S. 276, 281) 436, 444 (1829).

(a) Interpretation of the Act.

(See Appendix, pp. 52-56.)

The intervenors contend that the consent of the United States to be joined in this action is dependent upon an adjudication of *all* (as opposed to some of) the right, title and interest of the United States to the lands below the Lake's meander line and the minerals in solution in the Lake. In pertinent part, § 2 of the Act provides:

> "Sec. 2. Subject to the other provisions of the Act, The Secretary of the Interior shall by quitclaim deed convey to the State of Utah *all* right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State . . . whether *such lands* now are or in the future may become uncovered by the recession of the waters of said Lake . . . ." (Emphasis supplied.)

By § 5 of the Act, the State of Utah is given an election between two alternatives. For our purposes they are:

> "The State—
>
> "(a) May request the Secretary of the Interior to determine the fair market value of *the lands* as of the date of the completed survey . . . or,
>
> . . . . . .
>
> "(b) May maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States *in lands* conveyed to the State of Utah pursuant to section 2 of the Act. Consent to join the United States as a defendant to such an action is hereby given. Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value, as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of the Act *as may be found by the court to have been the property of the United States prior to the conveyance.*" (Emphasis supplied.)

However, § 2 contains a provision which reads in part as follows:

> "That the provisions of this Act shall not effect (1) any *valid* existing rights or interest, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any lands within and below the meander line . . . ." (Emphasis added.)

When the entire Act is considered along with its purpose, the limited jurisdiction of the Court in original actions before it and sovereign immunity, it appears that the expression "to secure a judicial determination of the right, title and interest of the United States in lands conveyed to

the State of Utah pursuant to section 2 of the Act" appearing in § 5(b) thereof does not mean necessarily *all* the rights, title, and interest of the United States to the lands and minerals lying below the meander line of the Lake. With certain exceptions, not material here, Congress desired to divest the government of whatever proprietary interest it had in the land and minerals for a price equal to the fair market value thereof. Section 2 of the Act. To do so it would be necessary to establish the government's title, especially between it and the State of Utah, to those items. Congress chose to have this done by having the United States joined as a defendant in an original action brought by the State of Utah in this Court. We must assume that Congress was aware of the jurisdictional limitations regarding parties in original actions before the Court, that interested private parties could not be joined validly without the consent of the State, and that ordinarily controversies between the United States and private parties may not be litigated in this Court. To read into § 5(b) of the Act a requirement that *all* the rights, title, and interest of the United States in the lands and minerals must be decided in this litigation as a condition to the consent to join the United States as a party defendant is to attribute to Congress an ignorance of the Court's original jurisdiction. When Congress meant *all* it used the word "all" in § 2 of the Act; it did not repeat that word in § 5(b). Moreover, any litigation between the United States and the State of Utah may not validly directly effect adversely the rights of private parties not joined in the action. The Constitution requires this effect. In fact, the Act, by the proviso in § 2, recognizes this principle by providing that a decision of this Court or any other action taken pursuant to the Act shall have no direct bearing on the valid existing rights of third persons. The fact that the adjective "valid" pro-

cedes the words "existing rights or interests" does not mean that their legal soundness must be determined in this action before the consent to join the United States provision becomes operative. To adjudicate the validity of such "existing rights or interests" solely for the purpose of determining whether they are unaffected by action to be taken pursuant to the Act would be of no avail.

(b) Prayer for Relief in Original Complaint.

Paragraphs 1 and 3 of the prayer for relief of the State of Utah's complaint (pp. 11 and 12) read as follows:

"WHEREFORE, plaintiff prays:

"1. That a decree be entered by this Court quieting title in the State of Utah as against *any and all* claims of the United States of America to the bed of the Great Salt Lake located within and below the official surveyed meander line of said lake; specifically declaring that the United States of America has no right, title, or interest *whatsoever* to any part of said land or minerals located therein or *any* part thereof, with the exception of the lands legally purchased and acquired by the United States of America from the State of Utah; and perpetually enjoining the United States of America from further asserting *any* right, title or interest in or to any of said land or minerals or *any* part thereof and from interfering with the possession, management, or development of said land by the State of Utah.

. . . . . .

"3. For such other and further relief as this Court may deem proper and necessary in these premises." (Emphasis added.)

The State of Utah may be granted only the relief to which it is entitled as against the United States, without affecting the rights and interests of third parties not joined in this action. Such relief is as broad as that contemplated by the Act and meets the requirement of the consent provision of § 5(b) to the Act.

(c) Effect of the Stipulation.

(See Appendix, pp. 69-72.)

Paragraph No. 1 of the Stipulation states that "the only object of the present suit is to determine whether, as against the United States, the State of Utah held title to the lands, brines and minerals below the meander line of the Great Salt Lake which the United States claims to have owned and conveyed to the State on June 15, 1967, with a view to later determining the compensation, if any, due by the State to the United States on account of that conveyance under Public Law 89-441." The object of the action, as stated in this paragraph, is only as broad as is permissible under the Act without the joinder of third parties. The prayer for relief in the Complaint could not validly ask for greater or wider relief, and hence this paragraph of the Stipulation makes explicit that which is implicit in the Complaint when read in connection with the Act, the jurisdictional limits of this Court and sovereign immunity from suit. So in effect this paragraph does not narrow the issues beyond the breadth required by the Act.

The second of two sentences in Paragraph No. 2 of the Stipulation provides:

> "In addition, the United States *reserves the right to assert* that it owned and conveyed to the State on June 15, 1967, all the brines and minerals in solution in the brines of the Great Salt Lake and all of the pres-

ently submerged lands underlying the Lake, and the State *reserves the right to contest the propriety of asserting such a claim in this litigation.*" (Emphasis added.)

Paragraph No. 3 of the Stipulation states:

"3. *Should* the United States assert that prior to June 15, 1967, it owned the brines and minerals in solution in the brines of the Great Salt Lake and the presently submerged lands underlying the Lake, and should the State fail to establish its own superior title as against the United States to these brines, minerals and submerged lands, *the State,* without further contest in this or any other proceeding, shall acknowledge the title of the United States prior to the conveyance of June 15, 1967, to all the lands uncovered and submerged) and brines and minerals described in paragraph 2 and *shall be bound to pay the United States the fair value of all such lands, brines and minerals in accordance with Public Law 89-441, or the conveyance thereof shall be null.*" (Emphasis added.)

The last sentence of Paragraph III of the Complaint states: "The State of Utah further owns all of the minerals contained within the waters of the Great Salt Lake and within the lands constituting the bed of the Great Salt Lake as herein defined." The Answer of the United States to this assertion is as follows: "The remaining allegations of Paragraph III are conclusions of law, premised for the most part upon the supposed navigability of the Great Salt Lake; such legal conclusions require no response in this Answer, and therefore are neither admitted nor denied, but to the extent that they may be construed as allegations of fact, they are denied." In addition, the first sentence of Paragraph V of the Complaint avers: "The State of Utah owns

the minerals and brines included within the waters of the Great Salt Lake." The Answer of the United States to this averment is: "The allegation of the first sentence of Paragraph V of the Complaint is a conclusion of law, which requires no answer, and which, therefore, is neither admitted nor denied; but to the extent that it may be construed as an allegation of fact, it is denied."

However, the previously quoted portions of the Stipulation may be read to the effect that the State of Utah may carve out of this action the assertion that it owns the bed of the Lake and the minerals in solution without agreeing to pay for them, and leave that issue for adjudication at a later date. If that reading is the one the parties intend, then the Stipulation reduces the claim made in the Complaint. Ordinarily, a plaintiff is master of his complaint and may seek less than that to which he is entitled from the defendant. The State of Utah does not have such complete freedom in this action for it must meet the requirements of Public Law 89-441 before the Court may continue to proceed with the action. The United States, as the original fee owner of every lake and its bed in the State of Utah, is the source of all title thereto. If it owned the beds, the United States also owned the minerals in or over the beds. See *Deseret Livestock Co. v. Utah*, 110 U. 239, 171 P. 2d 401, 403 (1946). Unless some act was done on its behalf, pursuant to Congressional authority, to diminish that interest, title to them remains in the United States. It may well be that on June 15, 1967, the United States no longer had any valid claim to an ownership interest in the Lake's bed or the minerals in solution in the Lake, and any assertion of a valid one would be useless. Whatever interest the United States had on that date, Congress, it seems to me, desired to place the burden on the State of Utah to prove that its title in the Lake's bed was superior to that of the United States and have this Court judicially proclaim whether such

interest existed or not. Anything less, in my opinion, would not meet the conditions of § 5(b) of Public Law 89-441. That the State of Utah is agreeable to pay the United States for such lands and minerals on the basis described in the latter part of Paragraph 3 of the Stipulation has no bearing on the consent issue as regards the right of Utah to sue the United States.

What has been said of the State of Utah holds true for the United States regarding the legal position it must take in this action. Congress may define the conditions under which it will permit suit against the United States. See *Honda v. Clark,* 386 U.S. 484, 501 (1967). And "The United States Attorney General has been held to be without power to waive the sovereign immunity of the United States. *Stanley v. United States,* 162 U.S. 255, 269-70; cf. *United States v. Shaw,* 309 U.S. 495, 501." *Ford Co. v. Dept. of Treasury,* 323 U.S. 459, 469, n. 14 (1945). Consequently, the United States must oppose any assertion of a superior title by the State of Utah in the land and minerals, and this requires, additionally, the elimination of the word "Should" at the beginning of Paragraph 3. Further, there must be eliminated in the Stipulation the second sentence of Paragraph 2, as there can be no reservation of right in the United States of all brines and minerals in the Lake, but in conformity with the statute, the Stipulation must put the same in issue.

The remaining paragraphs of the Stipulation, even if we assume it amends the Complaint, would not narrow the claim made in the Complaint. That the State of Utah is asserting to bind itself, through its Attorney General, to pay the United States for certain property designated as "public land reliction under *Basart*" and waive any claims under Paragraph 8 of the Stipulation to the return of any payment made by it to the United States for that land does not offend Public Law 89-441.

(d) Recommendation.

The parties should be granted leave to file their Stipulation of March 29, 1968. With the omission of the second sentence of Paragraph 2 and the word "Should" in Paragraph 3 of the Stipulation, as adverted to heretofore, there is put in issue under it title to the brines and minerals in solution and there is no deferring of this issue to some later date. The State of Utah, therefore, must show it has superior title to the brines and minerals rather than the United States.

VI.

INTERVENTION.

Intervention in civil cases in the federal district courts is governed by Rule 24 of the Federal Rules of Civil Procedure. However, the mere compliance with the procedural requirements of this rule will not permit, for that reason alone, the intervention of Morton and M & C Corporation in this action.

(a) Motion of Morton.

According to the allegations under the second defense of its proposed Answer to the State of Utah's Complaint accompanying its motion to intervene as *a party defendant*, Morton is the owner of tracts of uplands of the Lake, having derived its titles from the United States by virtue of mesne conveyances, through patents granted by the United States under authority of Congressional Acts, including the Utah Statehood Enabling Act, and that these tracts are now, and have been at all times, riparian to the Lake. On the basis of Federal decisional law, it claims title to the land between the water's edge and meander lines fronting its respective uplands. It further claims that its title with respect to each tract extends to the thread of the Lake by reason of the fact that on the date of the State's admission to statehood, the Lake was not navigable. It asserts that these lands are also being claimed by the State of Utah and the United States in this action. The prayer for relief is as follows:

> "WHEREFORE, this defendant prays that a decree be entered by this Court:
>
> "(a) Confirming, declaring and establishing that this defendant is the owner of all right, title and inter-

est in all of said relicted and water covered lands described in paragraphs I, II and III of the Second Defense which constitutes a part of the lands described in Section 2 of the Act of June 3, 1966, as amended, and the minerals located therein;

"(b) Confirming, declaring and establishing that the State of Utah and the United States are without any right, title or interest in said relicted and water covered lands and the minerals located therein;

"(d) Declaring that any conveyance, pursuant to Section 2 of the Act of June 3, 1966, as amended, made by the United States to the State of Utah with respect to said relicted and water covered lands be null and void;

. . . . . ."

By its motion to intervene and its proposed answer Morton demonstrates that it is opposing the State of Utah's claim of title and is seeking affirmative relief against that State. And although it speaks out against the claim of the United States under the Basart doctrine, Morton has not sought leave to file a cross-claim against the United States.

Supplemental Motion of M & C Corporation.

In its proposed Answer to the State of Utah's Complaint accompanying its Supplemental Motion to intervene as *a party defendant*, M & C Corporation denies that the State of Utah owns the exposed lands which they allegedly own in fee which are adjacent to its uplands and very limited in amount and prays for a decree quieting its title to the exposed lands as against the claims of the State of Utah. In its proposed Cross-claim it claims title to the same exposed land by virtue of the common-law doctrine of

reliction and accretion, and that the United States wrongfully asserts title to those lands and threatens to dispossess it, and prays for a decree quieting its title to those lands as against the United States.

(b) Motions of M & C Corporation.

According to paragraph III of its proposed complaint accompanying its motion to intervene as *a party plaintiff*, M & C Corporation holds in fee certain real property adjacent to and upland of the meander line of the Lake and also holds certain leasehold interests and a royalty agreement from the State of Utah, which interests collectively give it the right to extract minerals from the Lake. Claiming no adequate remedy at law it prays for the following relief:

> "1. Declare that [it] has, as against the United States, the right to use and possess the portion of the Lake embraced in [its] leaseholds . . . under their existing terms and conditions;
>
> "2. To enjoin Defendant U.S. . . . from asserting any claim to said portion of the Land or otherwise interfering with or disturbing [its] quiet and peaceful enjoyment thereof;"

(c) Jurisdiction of the Court in Original Actions Before It.

In pertinent part, Article III, § 2, of the United States Constitution provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies between two or more States, between a State

> and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects."
>
> "In all Cases . . . in which a State shall be a party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellant jurisdiction, ..."

The Eleventh Amendment to the United States Constitution provides that:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Thus the original jurisdiction of this Court is made dependent upon the character of the parties to a controversy, and the party or parties on one side must be a state or a number of states. But the party or parties on the other side of the case, citizen or citizens of another or opposing state, may not be joined to them as defendants, citizens of the same state which is bringing the action. *California v. Southern Pacific Co.*, 157 U.S. 229 (1895).

It is also clear that this Court does not have original jurisdiction over a controversy between a private corporation and the United States.

Since the would-be intervenors are deemed citizens of a state other than Utah, the Court would have original jurisdiction over an action brought by the State of Utah against either or both of them. *Pennsylvania v. Quicksilver Co.*, 10 Wall. (77 U.S.) 553 (1807); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

(1) Sovereign Immunity of a State From Suit.

It is stating the obvious to note that we must deal with at least one sovereign and are dealing with two in this action; and ordinarily they may not be sued without their consent. Although there is no express provision to that effect in the Constitution, except where the plan of that document involves the surrender of immunity from suit, the requirement of consent is necessarily implied. See *Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934). Also see *Hans v. Louisiana*, 134 U.S. 1, 11-12 (1889); *Parden v. Terminal R. Co.*, 377 U.S. 184, 191-198 (1964). "The evident purpose of the [Eleventh] Amendment, so promptly proposed and finally adopted was to prohibit all suits against a State, by or for citizens of other States, or aliens, *without the consent of the State to be sued* . . . ." (Emphasis added.) *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883).

(2) Waiver of Immunity From Suit by the State of Utah.

It is argued on behalf of the would-be intervenors that the State of Utah, by bringing this action against the United States to quiet title to the land and minerals, has tacitly consented to sue private persons claiming an interest in part of that land and minerals.

In contrast to that of the United States which requires a Congressional statute, a state may waive its immunity through its attorney general. As summarized in the opening paragraph of *Petty v. Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275 (1959), the Court said: "When the Court in 1793 held that a State could be sued in the federal courts by a citizen of another State (*Chisholm v. Georgia*, 2 Dall. 419), the Eleventh Amendment was passed precluding it. But this is an immunity which a State may waive at its pleasure (*Missouri v. Fiske*, 290 U.S. 18, 24) as by a general appearance in litigation in a federal court (*Clark*

v. Banard, 108 U.S. 436, 447-448) or by statute. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 468-470. The conclusion that there has been a waiver of immunity will not be lightly inferred. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171. Nor will waiver of immunity from suit in state courts do service for a waiver of immunity where the litigation is brought in the federal courts. Nor will waiver of immunity where the litigation is brought in the federal court. *Chandler v. Dix*, 194 U.S. 590, 591-592." (Footnotes omitted.)

The plan of the Constitution does not involve any surrender of sovereign immunity by the State of Utah from suit regarding this action. There are certain types of actions in which consent of the sovereign (or independent grounds of jurisdiction) are not a prerequisite to intervention. Examples are actions *in rem* (*Oklahoma v. Texas*, 258 U.S. 574, 581 (1922)), actions for claims against a fund in court (*Krippendorf v. Hyde*, 110 U.S. 276 (1884)), actions in the nature of an interpleader (*Texas v. Florida*, et al., 306 U.S. 398 (1939)), creditor's bill to set aside a fraudulent transaction (*Stewart v. Dunham*, 115 U.S. 61, 64 (1885)), and class actions.[11] But the action before the Court is not any of the types mentioned above.

The State of Utah has timely and appropriately raised the defense of sovereign immunity.[12] There is no automatic waiver simply because the sovereign institutes an action. In passing it may be noted that this Court, in

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11 The prerequisites to a class action and when they are maintainable are set forth in Rule 23 of the Federal Rules of Civil Procedure. However, the Court has cautioned: "Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions." *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

12 See *Illinois Central R. Co. v. Adams*, 180 U.S. 28 (1901), holding, inter alia, that sovereign immunity of a state is a defense that must be raised by appropriate means or it will be deemed to have been waived.

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513-514 (1939), said: "The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity . . . . Consent alone gives jurisdiction to adjudge against a sovereign. Absent the consent, the attempted exercise of judicial power is void."

(A) *Public Law 89-441* (See Appendix, pp. 52-56).

I do not see anything in this Act supporting the argument that this action should include parties other than the two sovereigns. The fact that § 5(b) of the Act provides that "consent is given *to join* the United States as *a defendant* in this action." [13] does not require the joinder of others. It may be argued that since Congress did not add to the first part of the proviso of § 2 of the Act the words "unless joined in this action", no nongovernmental private party was to be joined. But the Court need not go that far. At most the adoption of the expressions "to join" and "a defendant", it seems to me, is a means of showing that Congress has no objection to the State of Utah seeking permission of the Court to sue or join, if it so desired, other defendants (at least governmental entities if any) in the action, and even envisioned that it might do so, within the Constitutional requirement.

That Congress was aware that not all private interests would be joined in this action is made plain by the proviso in § 2 which in substance states that the provisions of the Act shall not effect the rights of any person or nongovernmental entity in the lands below the meander line. The Act does not give private interests any rights in addition to those they had before, nor does it deprive them of any.

13 Emphasis added.

Due process of law would require this latter effect even though the Act did not in terms say so. See *Union Pacific R. Co. v. United States*, 99 U.S. 700, 720 (1879). A judgment in favor of either sovereign in this action will not validly bind the interests of private parties not joined. *United States v. Oregon*, 295 U.S. 1, 12 (1935); *Archer v. United States*, 268 F.2d 687, 690 (C.A. 10, 1959).

(B) *Section 78-11-9 of the Utah Judicial Code, 9 Utah Code Ann. (1953) § 78-11-9.*

Morton also argues that the State of Utah by virtue of Section 78-11-9 of the Utah Judicial Code 9 Utah Code Annotated (1953) § 78-11-9, has consented to its joinder in this action. The first of three sentences of this section provides:

> "State of Utah party defendant in certain suits.—Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved."

The State of Utah claims that this section of the Code has been repealed by the Utah Governmental Immunity Act, Sections 63-30-1 et seq., effective July 1, 1966. 7 Utah Code Annotated (1953) § 63-30-1 et seq. (1967 Replacement Pocket Supp.)

(C) *Utah Governmental Immunity Act.*

Section 63-30-6 of this Act provides:

"Waiver of Immunity as to actions involving property.—Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved."

Section 63-30-16 of the Act provides:

"Jurisdiction of district courts over actions.—Application of Rules of Civil Procedure.—The district courts shall have exclusive original jurisdiction over any action brought under this act and such actions shall be governed by the Utah Rules of Civil Procedure insofar as they are consistent with this act."

And Section 36 of the Act provides:

"Conflicting Statutes Repealed.

"All other acts or statutes in conflict with provisions of this act are repealed as of the effective date of this act."

There is no cross reference to Section 78-11-9 of the Utah Judicial Code in any of these sections of the Act.

"No Court of the State of Utah has held that § 78-11-9 has been repealed by implication. That State follows the general rule that repeal of a statute by implication is not favored by the courts and only occurs if the later statute is wholly irreconcilable with the former statute. *Moss v. Board of Commissioners of Salt Lake City,* 1 Utah 2d 60,

261 P.2d 961 (1953). Also, wherever possible, an earlier and later statute will be harmonized so that they can stand separately and both be given effect. *Nelden v. Clark,* 20 Utah 382, 59 P.524 (1899)." (See Morton's letter to Special Master, dated February 22, 1968, Appendix, pp. 73, at 74-75.)

Giving the would-be intervenors the benefit of any doubt, and assuming that § 78-11-9 has not been repealed, I fail to see how that section aids them here. In my opinion the consent to be sued granted by the Utah Legislature in that section does not encompass the consent to the intervention of anyone as a party defendant in a suit brought by the State of Utah or the authority to sue anyone. Nor is it to be construed as such. As for § 63-30-16, it is part of the State's judicial code. Whatever its effect, it is not to be construed as granting the consent to sue private persons in the federal court or the authority to require that State to sue them. See *Chandler v. Dix,* 194 U.S. 590, 591-592 (1904), cited in *Petty v. Tennessee-Missouri Bridge Comm'n.,* supra, 359 U.S. at 276, and § 77 of the Utah Governmental Immunity Act providing that venue of actions under the Act shall be in the country where the cause of action arose or in Salt Lake County. 7 Utah Code Ann. (1953) § 63-30-17.

(3) Recommended Disposition of the Motions of the Would-Be Intervenors.

(1) Morton's motion should be denied on the ground that the State of Utah has not consented to sue that corporation in this action. If the motion is interpreted as also seeking leave to file a cross-claim against the United States, such motion should be denied for it would permit Morton to sue the United States without Constitutional authority.

(2) M & C Corporation's supplemental motion, to the extent that it seeks to intervene as a party defendant, should be denied for the same reason stated above in the first sentence.

(3) M & C Corporation's motion to intervene as a party plaintiff should be denied on the ground that this Court is without original jurisdiction to entertain a controversy between a private corporation and the United States even with the latter's consent.

(4) M & C Corporation's supplemental motion to intervene as a party defendant and file a cross-claim against the United States should also be denied for the reason stated in No. 3 above, and additionally, if it may not be a party, it may not file a cross-claim.

VII.

"INDISPENSABLE" PARTY ISSUE.

There is little dispute that the would-be intervenors meet the requirements of Rule 24(b)(2) of the Federal Rules of Civil Procedure.[14] The claim or defense of each one of them and the main action have a question of law or fact in common. Their intervention would not unduly delay or prejudice the adjudication of the rights of the original parties. Absent any jurisdictional or sovereign immunity bar, were this matter in the district court, a district judge would exercise his discretion and permit the would-be intervenors to intervene in the action.

The optimum solution, an adjudication of title to the land in question and the minerals in [illegible]ation that would be binding on all interested persons including Morton and M & C Corporation is not feasible here, because the State of Utah has not consented to sue or be sued by either one of the would-be intervenors. Additionally, there is no jurisdictional doorway through which Morton can enter for while it has not filed a cross-claim against the United States, by implication it is also suing the United States, since it has argued in its brief and at oral argument that it is contesting lands claimed by the United States. While

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14 Rule 24(b) provides: "(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

M & C Corporation has filed a cross-claim against the United States, neither it nor Morton has any constitutional authority to come into this court.

Therefore, the next question for the Court to decide: Is it equitable and in good conscience to proceed to adjudicate the controversy between the State of Utah and the United States in the compelled absence of interested parties (Morton and M & C Corporation) who should be joined if it were feasible to do so. If it is not, the Court must dismiss the action.

It is clear that the Court should proceed to decide the case in the absence of Morton et al. and not dismiss.

Rule 19 of the Fed. R. Civ. Proc. provides:

> "Rule 19. *Joinder of Persons Needed for Just Adjudication.*
>
> "(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk or incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in sub-division (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The facts to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the pre-prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

"(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23."

In the leading case of *Provident Bank v. Patterson*, 390 U.S. 102 (1968), the Court said: "Rule 19(b) suggests four 'interests' that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled.[2] . . . First, the plaintiff has an interest in having a forum. Before trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists.[3] . . . Second, the defendant may properly wish to avoid multiple litigation, or inconsistent

relief, or sole responsibility for a liability he shares with another . . . .

"Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty.[5] It obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on non parties simply because they are not 'bound' in the technical sense.[6] Instead, as Rule 19(a) expresses it, the court must consider the extent to which the judgment 'as a practical matter impair or impede his ability to protect' his interest in the subject matter . . . .

"Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controveries. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them . . . .

"Rule 19(b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests . . . ." (Footnotes omitted.) 390 U.S. at 109-111.

(a) Interest of the State of Utah.

The State claims all the land within the meander line and the minerals in and over the bed of the lake. Others claim an interest in that same land and minerals. The main adversary is the United States. If this action were

to be dismissed, the State of Utah would have no other forum to litigate the questions in this action against that adversary. Short of the State of Utah's withdrawing its claims to the above items and paying the fair market price for them, there is no other peaceable way other than this action in which Utah can eliminate the United States as a contender for those items. Congress has given consent to join the United States as a defendant in this action and this action only.

(b) Interest of the United States.

This party claims an interest in the minerals and title to a large portion of the relicted land. Part of this claim encompasses relicted land fronting uplands of patentees or those claiming through them. Under the present law, any party claiming adversely to the United States could not contest the latter's claim in a court, Federal or state, unless he were sued by the United States or the latter was violating his constitutional rights regarding such claims.[15] On the other hand, the United States, if it had elected to do so through its highest legal officer, could have brought an action similar to the one presently before the Court in (1) this Court,[16] (2) the United States District Court for the District of Utah, Northern Division,[17] or (3) a Utah

15 Morton has filed an action against the State of Utah and various of its officials and others in the United States District Court for the District of Utah (Civil Action No. C-127-66) alleging that the State has taken and deprived it of property (lands lying below the meander line of the Lake) without due process of law in violation of the Fourteenth Amendment to the Constitution (See Motion of Morton to Intervene as a defendant, and Answer, pp. 9-10, n. 5.) This is another possible reason why Morton has not sought leave to file a complaint in an original action before this Court which they might have done had Utah given its consent.

16 *United States v. Texas*, 143 U.S. 621 (1892).

17 Title 28, U.S.C. § 1345, which in part provides: "The district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . ."; *United States v. California*, 328 F.2d 729 (C.A.9, 1964), cert. denied, 379 U.S. 817.

State Court at least prior to July 1, 1966.[18]

It appears to be of no legal consequence under this heading whether this action was commenced either by the State of Utah or the United States. If the latter had brought the action, it would have lost a tactical advantage. That is, the burden of proof would have been upon it instead of the State of Utah as it will be in this action. The consent of the United States to sell whatever interest it had in the land and minerals to the State of Utah at a price equal to the fair market value of those items is to be considered a sufficient prid pro quo for Utah to have initiated the action here. However, even if the United States had taken the initiative here, the would-be intervenors would have been in no better position than they are now as to intervention.

If the United States had brought an action similar to the one before the Court against the State of Utah in the United States District Court for the District of Utah, Northern Division, it likewise would have lost the tactical advantage regarding the burden of proof. There, however, assuming that proper service could be had on them, there would be no jurisdictional obstacle to suing those claiming land which the United States also claims under the *Basart* doctrine along with those claiming through the State of Utah. But upland-fee owners claiming title through the United States would not be permitted to litigate their claims against the State of Utah without its consent. Thus they, in such a case, would be in no better position then they are now. The loss of the tactical advantage as to the burden of proof which the State of Utah would have had in such an

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18 Section 21 of the Utah Governmental Immunity Act, effective July 1, 1966, provides: "*Claims by other governmental entities.*—Notwithstanding any other provision of this act, no claim hereunder shall be brought by the United States or by any other state, territory, nation or governmental entity." L. 1965, ch. 139, § 21, 7 Utah Code Ann. (1953) 63-30-21.

action is compensated by the agreement in Public Law 89-441, as amended.

If the outcome of this action depends, alternatively or otherwise, on the issue of navigability of the Lake, then it would have been futile for the United States to have sued the State of Utah in its own Courts. In *Deseret Livestock Co. v. Utah*, supra, 110 U. 239, 171 P.2d 401, 403 (1946), the Supreme Court of Utah said that the "court will take judicial knowledge of the fact that Great Salt Lake is a navigable body of water and that it contains about 22 per cent salt in solution therein." and that "the state as the owner of the beds of navigable bodies of water is entitled to all valuable minerals in or on them."

(c) Interest of Absent Persons Who Should Be Joined.

(1) Morton: This corporation's sole interest in the subject matter of this action is a common question of law and fact. Without the consent of the sovereign, there is no forum in which Morton may go to litigate those questions of law and fact absent the interference of either sovereign with Morton's quiet enjoyment of the relicted land fronting its uplands. That this is so is no fault of the Court. In any event, Morton is in no wise worse off now than before this action was instituted.

The State of Utah's claim is being resisted by the United States, which is being represented by the second highest judicial officer in the country. In the absence of any allegations of bad faith or gross negligence on his part and clear proof of same, Morton's position will be adequately advanced by the United States in its case and it will adequately represent the interest of that corporation and all private persons similarly situated. For example, see: *MacDonald v. United States*, 119 F.2d 821 (C.A.9, 1941).

(2) M & C Corporation: As far as its leasing, licensing and royalty rights may be affected, this corporation has no real concern whether the State of Utah or the United States is declared the winner in this action. For no matter in which sovereign's favor this Court decides, the legal relationship between the State and M & C Corporation will remain as before. Even if this were not so, it cannot be said at this juncture that, with the highest judicial officer of the State of Utah resisting the claim of the United States, M & C Corporation's interest in the outcome would not be adequately represented in this action.

Regarding its interest stemming from upland fee holdings, this corporation is in no better position than Morton on the issue of "indispensable" Parties. Therefore, what has been said about Morton applies with equal force to M & C Corporation.

(d) Interest of the Public and the Courts.

Without elaboration, the public and the courts have an interest in having the question of title over the relicted land decided. If it cannot be done as to all the persons in interest—at least a start in having it decided should be made. The matter is here. The Court should not lose the opportunity to get the ball rolling at least. Deciding the matter as between the State of Utah and the United States will be a big step in that direction.

(e) Recommendation.

But even if Morton et al. had a more direct interest in the subject matter of this litigation, the interest of the State of Utah and, incidentally, the United States, the public and the courts in having this litigation completed far outweigh that of the private corporations to intervene herein.

From the foregoing, in my opinion, it is equitable and in good conscience to proceed to adjudicate the controversy between the State of Utah and the United States in the compelled absence of Morton and M & C Corporation. It is therefore submitted that this Court not dismiss the action on "indispensable" party grounds and permit the State of Utah and the United States to proceed to the merits of this action.

VIII.

SHOULD THIS COURT EXERCISE ORIGINAL JURISDICTION OVER THE ACTION BETWEEN THE STATE OF UTAH AND THE UNITED STATES?

In the case of *Georgia v. Pennsylvania,* 324 U.S. 439, 464 (1945), the Court said: "It does not necessarily follow that the Court must exercise its original jurisdiction. It has at times been held that this Court is not the appropriate tribunal in which to maintain suits brought by a State. . . . The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." (Citations omitted.) Also see Stern and Gressman, Supreme Court Practice (3rd ed.) § 9-7.

The discussion under this heading overlaps that under (a) and (b) of Topic VII, regarding the interest of the State of Utah and the United States under the "Indispensable" party issue. For the reasons there stated, the State of Utah should not be penalized because the United States had not brought the action earlier either in this Court or in the United States District Court for the District of Utah, Northern Division.

(a) Recommendation.

Accordingly, in my opinion, the Court should not refuse to exercise jurisdiction over this action, and the motions of Morton International, Inc., and Great Salt Lake Minerals & Chemicals Corporation should be denied.

Respectfully submitted,

J. CULLEN GANEY,
Senior Circuit Judge,
Special Master.

Appendix.

RELEVANT DOCKET ENTRIES.

Mar. 1, 1967. Motion for leave to file bill of complaint filed.

May 1, 1967. Response to motion for leave to file complaint filed.

May 3, 1967. Motion for leave to file bill of complaint distributed.

May 15, 1967. Motion for leave to file bill of complaint granted and the United States is allowed sixty days to answer.

Jun. 5, 1967. Appointment of Special Master distributed.

Jun. 12, 1967. Ordered that the Honorable J. Cullen Ganey, Senior Judge of the United States Court of Appeals for the Third Circuit be; and he is hereby appointed Special Master in this case. See ORDER.

Jun. 15, 1967. Oath of Special Master filed.

Jul. 14, 1967. Answer filed.

Sept. 18, 1967. Motion of Morton International, Inc. to intervene as defendant and file answer filed.

Oct. 11, 1967. Above Motion distributed.

Oct. 23, 1967. Motion of Morton International, Inc., for leave to intervene and file answer is referred to Special Master. Marshall, J., OUT.
Counsel for Morton International: Martin Jacobs, Myer Feldman, L. M. McBride, Frank A. Wollaeger.

Jan. 25, 1968. Brief of the State of Utah in opposition to motion by Morton International, Inc. for leave to intervene and answer filed.

Jan. 26, 1968. Motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a plaintiff, and its complaint filed.

Feb. 5, 1968. Reply brief of Morton International, Inc. to brief of State of Utah in opposition to motion of Morton International, Inc. for leave to intervene, filed.

Feb. 7, 1968. Motion of Great Lake Minerals & Chemicals Corporation for leave to intervene distributed.

Feb. 15, 1968. Joint motion for order directing manner of payment of Special Master's expenses filed. (NP)

Feb. 19, 1968. Supplemental motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a defendant, and its answer and cross claim filed.

Feb. 20, 1968. Memorandum for United States filed.

Feb. 20, 1968. Reply memorandum for United States filed.

Feb. 21, 1968. Supplemental motion of Great Salt Lake Minerals & Chemical Corporation to intervene as a defendant, and its answer and cross claim distributed. Also joint motion for order directing manner of payment of Special Master's expenses distributed.

Feb. 21, 1968. Memorandum for U. S. in response to motion and amended motion of Great Salt Lake Minerals & Chemicals Corporation filed.

Feb. 24, 1968. Brief of the State of Utah in response to reply brief of United States, etc.

Mar. 5, 1968. Motion of Great Lake Minerals & Chemicals Corp. for leave to intervene distributed. Also supplemental motion of Great Salt Lake Minerals & Chemicals Corp. to intervene as a defendant and its answer and cross claim distributed. Also joint motion for order directing manner of payment of Special Master's expenses distributed.

Mar. 11, 1968. Joint motion for order directing manner of payment of Special Master's expenses *withdrawn.*

Mar. 11, 1968. Motions of the Great Salt Lake Minerals & Chemicals Corp. for leave to intervene as a plaintiff and to intervene, in the alternative, as a defendant, together with its answer and cross claim are referred to the Special Master for a report and recommendation. Such report and recommendation shall also include the motion of the Morton International, Inc., for leave to intervene heretofore referred to the Special Master, Marshall, J., OUT.

Apr. 16, 1968. Brief of Morton International, Inc. in response to stipulation and supplemental memorandum for the United States filed.

Apr. 17, 1968. Memorandum of Great Salt Lake Minerals & Chemicals Corp. regarding Stipulation between U. S. and State of Utah filed.

Apr. 22, 1968. Supplemental memorandum for U. S. and stipulation filed.

May 17, 1968. Joint motion for leave to file stipulation filed.

May 20, 1968. Waiver of right to file response to joint motion for leave to file stipulation by Morton International, Inc., filed.

May 21, 1968. Waiver of right to file response to joint motion for leave to file stipulation by Great Salt Lake Minerals & Chemicals Corp. filed.

May 22, 1968. Joint motion for leave to file stipulation distributed.

Jun. 3, 1968. Joint motion for leave to file a stipulation, etc., referred to Special Master. Marshall, J., OUT.

STATUTE INVOLVED.

PUBLIC LAW 89-441
June 3, 1966 [S. 265]

AN ACT

To authorize conveyance of certain lands to the State of Utah based upon fair market value.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior shall within six months of the date of the passage of this Act complete the public land survey around the Great Salt Lake in the State of Utah by closing the meander line of that Lake, following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed area.

SEC. 2. Subject to the other provisions of this Act, the Secretary of the Interior shall by quitclaim deed convey to the State of Utah all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State, as duly surveyed heretofore or in accordance with section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake: *Provided, however,* That the provisions of this Act shall not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below said meander line, or (2) any lands within the Bear River Migratory Bird Refuge and the Weber Basin Federal reclamation project.

Such conveyance shall be made when the survey required by section 1 has been completed and the agreement required by section 6 has been made.

SEC. 3. The conveyance authorized by this Act shall contain an express reservation to the United States of all minerals, except brines and minerals in solution in the brines, or precipitated or extracted therefrom in whatever Federal lands there may be below the meander line of Great Salt Lake, together with the right to prospect for, mine, and remove the same. The minerals thus reserved shall thereupon be withdrawn from appropriation under the public land laws of the United States, including the mining laws, but said minerals, in the discretion of the Secretary of the Interior, may be disposed of under any of the provisions of the mineral leasing laws that he deems appropriate: *Provided,* That any such lease shall not be inconsistent, as determined by the Secretary of the Interior, with the other uses of said lands by the State of Utah, its grantees, lessees, or permittees.

SEC. 4. As a condition of the conveyance authorized in this Act, and in consideration thereof, the State of Utah shall, (a) upon the express authority of an Act of its legislature, convey to the United States by quitclaim deed all of its rights, title, and interest in lands upland from the meander line, which lands the State may claim against the United States by reason of said lands having been, or hereafter becoming, submerged by the waters of Great Salt Lake, and (b) pay to the Secretary of the Interior the fair market value, as determined by the Secretary, of the lands (including any minerals) conveyed to it pursuant to section 2 of this Act. The Secretary of the Interior, after consultation with the State of Utah, may accept in payment in behalf of the United States, in lieu of money only, interests in lands, interests in mineral rights, includ-

ing those beneath the lakebed, the relinquishment of land selection rights, or any combination thereof equal to the fair market value.

SEC. 5. Within nine months after the date of enactment of this Act the State of Utah shall elect one of the alternatives set out in subsection (a) or subsection (b) of this section, and a failure so to elect shall render null and void any conveyance pursuant to this Act. The State—

(a) may request the Secretary of the Interior to determine the fair market value of the lands as of the date of the completed survey:

(1) In reaching a determination of the fair market value as of that time, the Secretary shall make a comprehensive study of the lands and minerals which are the subject of this Act;

(2) Nothing in this section shall be deemed to limit or prevent the Secretary from giving consideration to all factors he deems pertinent to an equitable resolution of the question of the proper consideration to be paid by the State of Utah to the United States for such lands;

(3) The Secretary shall transmit his value determination to the Government of the State of Utah not later than two years after he receives the request referred to above in this subsection. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determination, the conveyance authorized by section 2 of this Act shall be null and void; or

(b) may maintain an action in the Supreme Court of the United States to secure a judicial determination

of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act. Consent to join the United States as a defendant to such an action is hereby given. Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value, as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of this Act as may be found by the court to have been the property of the United States prior to the conveyance. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determination, the conveyance authorized by section 2 of this Act shall be null and void.

SEC. 6. Pending resolution of the amount and manner of compensation to be paid by the State of Utah to the United States as provided herein, the State of Utah is authorized after making the agreement required by this section to issue permits, licenses, and leases covering such of these lands as the State deems necessary or appropriate to further the development of the water and mineral resources of the Great Salt Lake, or for other purposes. The State of Utah, by or pursuant to an express act of its legislature, shall agree to assume the obligation to administer the lands, for the purposes set forth above, in the manner of a trustee and any proceeds derived by the State of Utah therefrom shall be paid to the United States, until compensation for the full value of said lands as herein provided is made. Such proceeds paid to the United States shall be to the credit of the State of Utah as part of the compensation for which provision is made herein. If the question of the title to the United States is litigated as authorized by section 5(b) of this Act, and it is determined

that the United States has no right, title, or interest in lands from which revenues have been derived and paid to the United States pursuant to this section, the revenues paid to the United States shall be returned to the State of Utah without interest.

In the event the conveyance authorized by section 2 of this Act becomes null and void, then any valid permits, licenses, and leases issued by the State under authority of this section, shall be deemed permits, licenses, and leases of the United States and shall be administered by the Secretary in accordance with the terms and provisions thereof.

Approved June 3, 1966.

PUBLIC LAW 89-542

August 23, 1966 [S. 3484]

An Act

To amend the Act of June 3, 1966 (Public Law 89-441, 80 Stat. 192), relating to the Great Salt Lake relicted lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 6 of the Act of June 3, 1966 (Public Law 89-441, 80 Stat. 192), is amended by changing the period at the end of the section to a comma and adding the following: "excepting for land rental rates which rates shall be subject to change based upon fair rental value as determined by the Secretary of the Interior and shall be subject to review and appropriate modification not less frequently than every five years by the Secretary of the Interior in accordance with rules and regulations of the Department of the Interior."

Approved August 23, 1966.

COMPLAINT.

The State of Utah, by its Attorney General, brings this suit in equity against the United States of America, and for its cause of action alleges:

I.

[1] The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, and the United States of America has consented to be sued in this Court in this action by virtue of Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542.

II.

[1] The State of Utah owns certain lands, hereinafter more fully identified, in which the United States of America claims an ownership interest contrary and opposed to the ownership of the State of Utah. Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542, granted the consent of

ANSWER.

I.

[1] The defendant admits the allegations of Paragraph I of the Complaint.

II.

[1] The defendant denies the allegation of the first sentence of Paragraph II of the Complaint that the State of Utah owns the lands which are the subject of this suit. [2] The defendant admits the remaining allegations in Paragraph II.

Complaint

the United States of America to be sued in this action to determine what interest, if any, the United States of America actually owned in and to said lands. [2] Said act authorized the State of Utah either to purchase the ownership interest claimed by the United States of America or to maintain an original action in this Court to determine whether the United States of America actually had any ownership interest. The State of Utah has formally determined and elected to maintain this action in this Court.

III.

[1] The Great Salt Lake is a navigable body of water located wholly within the State of Utah. The Great Salt Lake was navigable on January 4, 1896, when the State of Utah was admitted into the Union of the United States of America; it has at all times since been navigable; and it now is a navigable body of water. [2] The fact of navigability was

Answer

III.

[1] The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of the first two sentences of Paragraph III of the Complaint that the Great Salt Lake is a navigable body of water. [2] The remaining allegations of Paragraph III are conclusions of law, premised for the most part upon the sup-

Complaint

recognized by Congress in the enactment of Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542. The fact of navigability has been recognized further by the United States of America in its claim to the lands which are the subject of the instant litigation. At the date of statehood, by virtue of its admission into the Union on an equal footing with all other states, the State of Utah became the owner in a sovereign and proprietary capacity of the beds of all navigable lakes and streams located within the State of Utah. Therefore, at the date of statehood, by virtue of its admission into the Union on an equal footing with all other states, the State of Utah became the owner, has ever since been the owner, and now is the owner of the absolute right to the bed of the Great Salt Lake as delineated and determined by the official surveyed meander line of the Great Salt Lake, which meander line repre-

Answer

posed navigability of the Great Salt Lake; such legal conclusions require no response in this Answer, and therefore are neither admitted nor denied, but to the extent that they may be construed as allegations of fact, they are denied.

Complaint	*Answer*
sents the mean high water mark of said lake as it existed at date of survey and as it existed at the date of statehood. The State of Utah further owns all of the minerals contained within the waters of the Great Salt Lake and within the lands constituting the bed of the Great Salt Lake as herein defined.	
IV.	IV.
[1] The State of Utah has at all times since the date of statehood managed and administered the lands constituting the bed of the Great Salt Lake located below the surveyed meander line. The State of Utah has invested many millions of dollars in the development and improvement of much of the land constituting the bed of the Great Salt Lake. Further, the State of Utah has issued agricultural, mineral, and other leases covering much of said land. [2] The unqualified ownership of the State of Utah in and to these lands has been generally	[1] The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first three sentences of Paragraph IV of the Complaint. [2] The defendant denies the allegations of the fourth and fifth sentences of Paragraph IV of the Complaint. [3] The defendant admits the truth of the allegation of the sixth sentence of Paragraph IV. [4] The defendant denies the allegations of the seventh and eighth sentences of Paragraph IV. [5] The defendant admits the allegations of all of the remaining

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recognized and undisputed. The United States of America itself has recognized such ownership in the State of Utah for more than 65 years. [3] In fact, the United States of America itself has purchased from and paid the State of Utah for certain of the lands constituting a part of the bed of the Great Salt Lake. [4] The United States of America first asserted in 1959 a claim to part of the land owned by the State of Utah located below the surveyed meander line of the Great Salt Lake and constituting a part of the bed of the Great Salt Lake. The United States of America had fully recognized title in the State of Utah prior to that time. [5] The State of Utah believes that the United States of America now claims to own approximately 436,000 acres of the bed of the Great Salt Lake. Since these lake beds lands are unsurveyed, it is not possible to describe by metes and bounds the land in dispute. However, said lands are gen-

Answer

sentences of Paragraph IV, [6] except for the thirteenth, as to which defendant denies plaintiff's claim of ownership, and [7] the last (the fourteenth), which the defendant denies in its entirety.

Complaint	*Answer*
erally identified on a map prepared by the United States of America which purports to show those areas which are claimed by the United States of America. Said map is marked Exhibit A, attached hereto, at pp. 14 and 15, and by this reference made a part of this complaint. [6] The claim of ownership of these lands by the United States of America is adverse to the ownership of the State of Utah. [7] In fact, the United States of America has no right, title, or interest in or to any of the lands illustrated in Exhibit A or to any other part of the bed of the Great Salt Lake as located below and within the surveyed meander line.	
V.	V.
[1] The State of Utah owns the minerals and brines included within the waters of the Great Salt Lake. Said minerals and brines have a substantial value if the same can be extracted, processed, and marketed. [2] The State	[1] The allegation of the first sentence of Paragraph V of the Complaint is a conclusion of law, which requires no answer, and which, therefore, is neither admitted nor denied; but to the extent that it may be con-

Complaint

of Utah has issued a number of mineral leases to lessees who are able and anxious to establish a mineral industry around the Great Salt Lake. [3] Such an industry is vitally important to the economy and interests of the State of Utah. This mineral development requires the use of the exposed portions of the bed of the Great Salt Lake for settling ponds and for other uses incidental to the mineral extraction industry. The mineral extraction industry cannot proceed until there is certainty of title as to the exposed portions of the bed of the Great Salt Lake. The exposed lands constituting a part of the bed of the Great Salt Lake have no significant inherent value, but they are vital to the State of Utah for use in connection with said mineral extraction from the waters and brines of the Great Salt Lake. The claims and actions of the United States of America have impaired, hampered, frus-

Answer

strued as an allegation of fact, it is denied. [2] The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of the second sentence of Paragraph V of the Complaint. [3] The remaining allegations of Paragraph V are merely argumentative, and do not require an answer, but to the extent that they may be construed as allegations of fact, they are denied.

Complaint

trated, and prevented the State of Utah and its lessees from proceeding with the mineral extraction industry; the claims and actions of the United States of America further have cast serious clouds on the water fowl management areas and other developed portions of the bed of the Great Salt Lake now owned and managed by the State of Utah; and the claims and actions of the United States of America still further have cast a cloud on the ownership of the State of Utah as to all portions of the bed of the Great Salt Lake illustrated in Exhibit A. The State of Utah has suffered irreparable injury as a result of said claims and actions by the United States of America and will continue to suffer irreparable injury until such claims and actions by the United States of America cease. The State of Utah has no adequate remedy at law.

Answer

Complaint

WHEREFORE, plaintiff prays:

1. That a decree be entered by this Court quieting title in the State of Utah as against any and all claims of the United States of America to the bed of the Great Salt Lake located within and below the official surveyed meander line of said lake; specifically declaring that the United States of America has no right, title, or interest whatsoever to any part of said land or minerals located therein or any part thereof, with the exception of the lands legally purchased and acquired by the United States of America from the State of Utah; and perpetually enjoining the United States of America from further asserting any right,

Answer

VI.

The defendant denies each and every allegation of the Complaint not specifically admitted, denied, or qualified herein.

WHEREFORE, having fully answered, the defendant prays this Court to confirm, declare and establish that the United States is the owner of all right, title and interest in all of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

Complaint *Answer*

title, or interest in or to any of said land or minerals or any part thereof and from interfering with the possession, management, or development of said land by the State of Utah.

2. That this Court appoint a master to hear and consider all admissible evidence relating to the claims of ownership and to make his findings and recommendations to this Court.

3. For such other and further relief as this Court may deem proper and necessary in these premises.

.....

Phil L. Hansen
Attorney General
of Utah
Counsel for
Plaintiff
236 State Capitol
Building
Salt Lake City,
Utah

Complaint *Answer*

State of Utah
County of Salt Lake } ss

Calvin L Rampton, first being duly sworn upon his oath, deposes and says that he is the duly elected, qualified, and acting Governor of the State of Utah; that he has read the contents of the foregoing complaint; that the same are true of his own knowledge, except as to those matters alleged therein on information and belief; that as to those, he believes the same to be true.

.....
Calvin L. Rampton
Governor of Utah

Subscribed and sworn to before me this 27th day of February, 1967.

.....
Clyde L. Miller
Secretary of State
of Utah

CERTIFICATE OF SERVICE

I, Phil L. Hansen, Attorney General of the State of Utah, counsel for plaintiff, and a member of the bar of this Court, hereby certify, in accordance with Rule 33(b) of the rules of this Court, that five copies of the foregoing motion for leave to file complaint and complaint were personally served upon the Solicitor General of the United States of America, Department of Justice, Washington 25, D.C., counsel for defendant United States of America, by having same delivered to his office, strictly in accordance with the requirements of Rule 33 (1) and (2) of the rules of this court, this 1st day of March, 1967.

.....

Phil L. Hansen
Attorney General
of Utah
Counsel for
Plaintiff
236 State Capitol
Building
Salt Lake City,
Utah

STIPULATION.

The State of Utah and the United States agree and stipulate as follows:

1. Notwithstanding anything to the contrary in the Complaint filed herein by the State of Utah or the Answer filed by the United States, the only objective of the present suit is to determine whether, as against the United States, the State held title to the lands, brines and minerals below the meander line of the Great Salt Lake which the United States claims to have owned and conveyed to the State on June 15, 1967, with a view to later determining the compensation, if any, due by the State to the United States on account of that conveyance under Public Law 89-441.

2. The presently uncovered lands which the United States claims to have owned and conveyed to the State on June 15, 1967, are correctly shown on the attached map, and comprise approximately 325,574 acres indicated as "public domain reliction" and approximately 108,780 acres indicated as "public land reliction under *Basart.*" In addition, the United States reserves the right to assert that it owned and conveyed to the State on June 15, 1967, all the brines and minerals in solution in the brines of the Great Salt Lake and all of the presently submerged lands underlying the Lake, and the State reserves the right to contest the propriety of asserting such a claim in this litigation.

3. Should the United States assert that prior to June 15, 1967, it owned the brines and minerals in solution in the brines of the Great Salt Lake and the presently submerged lands underlying the Lake, and should the State fail to establish its own superior title as against the United States to these brines, minerals and submerged lands, the

State, without further contest in this or any other proceeding, shall acknowledge the title of the United States prior to the conveyance of June 15, 1967, to all the lands (uncovered and submerged) and brines and minerals described in paragraph 2 and shall be bound to pay the United States the fair value of all such lands, brines and minerals in accordance with Public Law 89-441, or the conveyance thereof shall be null.

4. Should the State establish its own superior title as against the United States to the brines and minerals in solution in the brines of the Great Salt Lake and the presently submerged lands of the Lake, but fail to establish its own superior title as against the United States to the uncovered lands indicated on the attached map as "public domain reliction lands," the State, without further contest in this or any other proceeding, shall acknowledge the title of the United States prior to the conveyance of June 15, 1967, to all the uncovered lands described in paragraph 2 (including those designated as "public domain reliction" and those designated as "public land reliction under *Basart*" on the attached map) and shall be bound to pay the United States the fair value of all such uncovered lands in accordance with Public Law 89-441, or the conveyance thereof shall be null.

5. Should the State establish its own superior title as against the United States to the uncovered lands indicated on the attached map as "public domain reliction lands," the United States, without further contest in this or any other proceeding, shall abandon any claim as against the State to ownership prior to June 15, 1967, of the uncovered lands indicated on the attached map as "public land reliction under *Basart*," and shall acknowledge that the State owes nothing to the United States on account of the conveyance of such lands under Public Law 89-441.

6. In no event shall the judgment herein be taken as adjudicating or affecting the title of persons or corporations claiming lands (uncovered or submerged), brines or minerals below the meander line of the Great Salt Lake, whether those which the United States claims to have owned prior to June 15, 1967, or others; nor shall the conveyance of June 15, 1967, from the United States to the State or any subsequent payment by the State to the United States affect the validity of such claims.

7. Neither this stipulation nor the judgment herein shall affect title to the minerals reserved to the United States by Section 3 of Public Law 89-441 and excepted from the conveyance of June 15, 1967, executed pursuant thereto.

8. The State expressly waives any claim to the return of any payment made to the United States pursuant to Public Law 89-441 for lands (uncovered or submerged), brines or minerals conveyed to the State on June 15, 1967, should it be determined in subsequent proceedings that such lands, brines or minerals were owned by others and not the United States; and although the State and the United States believe that any payment so made will be the property of the United States and will not be subject to any claim by any other person, the State agrees to indemnify the United States should it be adjudicated to be liable to any claimant with respect to any such payment on the ground that the United States was not the true owner of such lands, brines or minerals on the date of the conveyance.

9. This stipulation is for the purpose of identifying, clarifying and limiting the scope of the present litigation and any judgment or decree entered herein, and shall not be construed to alter the burden of proof or the burden

of proceeding with the evidence otherwise attributable to either party in asserting its respective claims and defenses against the other.

PHIL L. HANSEN,
Attorney General,
State of Utah.

ERWIN N. GRISWOLD,
Solicitor General,
United States of America.

MARCH 1968.

(Letterhead of)

Mc Bride, Baker, Wienke & Schlosser
110 North Wacker Drive
Chicago, Illinois 60606

February 22, 1968

Honorable J. Cullen Ganey
Senior United States Circuit Judge
United States Court of Appeals
for the Third Circuit
3030 United States Courthouse
Philadelphia, Pennsylvania 19107

Dear Judge Ganey:

Re: *State of Utah v. United States of America*
No. 31, Original—October Term, 1967
Supreme Court of the United States

During that portion of the hearing on February 9, 1968 relating to Utah's claim of sovereign immunity in opposition to Morton's motion to intervene, Mr. Hansen stated that the consent statute, Section 78-11-9, Utah Code Annotated, cited by us at page 11 of Morton's reply brief, had been repealed effective July 1, 1966.

Although, for the reasons stated in our brief and argument, we do not rely primarily on this consent statute because it is clear under case law that the doctrine of sovereign immunity does not apply in this situation, we were surprised at Mr. Hansen's statement. Accordingly, we requested our Utah counsel to check the matter again and we have been advised that, contrary to the Attorney General's statement, Section 78-11-9 has not been expressly repealed by the Utah Legislature and remains on the statute books.

We, therefore, adhere to the position set forth in our brief that, even if consent were necessary, Utah by Section 78-11-9 has consented to any adverse claim by Morton in this action.

Apparently, Mr. Hansen made this statement on the theory that Section 78-11-9 was repealed by *implication* by the Governmental Immunity Act, Section 63-30-1, et seq., Utah Code Annotated, effective July 1, 1966, although this was not made clear during his argument. A Xerox copy of the pertinent sections of the Governmental Immunity Act is attached to this letter. This act waives immunity for many actions, such as tort and contract, as well as actions involving property.

Section 63-30-16 provides:

> "The district courts shall have exclusive jurisdiction over any action *brought under this act* and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this act." (emphasis added)

Section 36 of the act provides:

> "All other acts or statutes in conflict with the provisions of this act are repealed as of the effective date of this act."

There is no cross reference to Section 78-11-9 of the Judicial Code.

No Utah court has held that Section 78-11-9 has been repealed by implication. Utah follows the general rule that repeal of a statute by implication is not favored by the courts and only occurs if the later statute is wholly irreconcilable with the former statute. *Moss v. Board of Commissioners of Salt Lake City*, 1 Utah 2d 60, 261 P.2d 961 (1953). Also, whenever possible, an earlier and later statute will

be harmonized so that they can stand separately and both be given effect. *Nelden v. Clark,* 20 Utah 382, 59 P. 524 (1899).

Section 78-11-9 and the Utah Governmental Immunity Act are neither irreconcilable nor inconsistent. Both Section 78-11-9 and Section 63-30-6 of the Imunity Act permit the State of Utah to be sued for recovery of property or to quiet title thereto, but the former statute, unlike the latter, expressly excludes any money judgment against the State in connection therewith. Accordingly, if a litigant desires to recover money as well as property against Utah, he can sue the State under the Governmental Immunity Act, but he is limited "under this act" to the Utah courts. Conversely, where Federal jurisdiction otherwise exists, nothing in the Governmental Immunity Act is inconsistent with a litigant suing the State in the Federal court pursuant to Section 78-11-9 where he seeks only to recover property.

The foregoing is submitted merely to clear up whatever confusion may exist in the record and to reaffirm Morton's position on this point.

Very truly yours,

FRANK A. WOLLAEGER

FAW:mh
Enclosure

cc: Honorable Erwin N. Griswold
Honorable Phil L. Hansen
George E. Boss, Esq.
Robert D. Larsen, Esq.

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SUPREME COURT, U. S.

No. 31, ORIGINAL

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

EXCEPTIONS OF MORTON INTERNATIONAL, INC. TO REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

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No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

EXCEPTIONS OF MORTON INTERNATIONAL, INC. TO REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

EXCEPTIONS

MORTON INTERNATIONAL, INC., a Delaware corporation (hereinafter referred to as "Morton"), movant for intervention herein, excepts generally to the conclusions of law, opinion and recommendations contained in the Report of the Special Master filed with the Court on October 28, 1968, other than the Special Master's conclusion contained in Part IV of his Report that the complaint presents a case or controversy within the meaning of the Constitution of the United States, and in support of such exceptions Morton respectfully submits the following brief.

STATEMENT OF THE CASE

This is a civil action in which the State of Utah seeks a judicial determination to quiet title to certain lands and minerals therein situated below the surveyed meander line of the Great Salt Lake and an adjudication that the United States has no right, title or interest in or to those lands and

minerals. The action was instituted pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and the Act of June 3, 1966, 80 Stat. 192 (Public Law 89-441), as amended by Act of August 23, 1966 80 Stat. 349, which Act is set forth beginning at page 52 of the Special Master's Report. This action by the State of Utah was also authorized by an Act of the Utah State Legislature.[1]

On July 14, 1967 the United States filed its answer to the complaint, and on September 18, 1967 Morton filed its motion to intervene as a defendant and its proposed answer on the ground that it is a person who must be joined as a party to the action under the indispensable party doctrine. The proceedings thus far have been set forth in detail in Parts II and III and in the Appendix of the Special Master's Report and will not be restated here, except for such items as have particular significance to the issue of Morton's intervention.

Briefly summarized, the factual basis for Morton's motion to intervene as a person whose joinder is required under the indispensable party doctrine is as follows:

(1) Utah has alleged in its complaint that on January 4, 1896, the date on which the State was admitted to the Union, the Great Salt Lake was a navigable body of water and that therefore it is the owner of the absolute right to the bed of the Lake as delineated and determined by the official surveyed meander line. Utah has also alleged that it owns all of the minerals contained in the waters and bed of the Lake, and that it believes the United States claims to own approximately 436,000 acres of the bed of the Lake. The latter lands are generally identified on a map prepared

[1] Laws of Utah, 1966, 2d Spec. Sess. ch. 11.

by the Bureau of Land Management of the Department of Interior, a copy of which was appended to the complaint as Exhibit A.

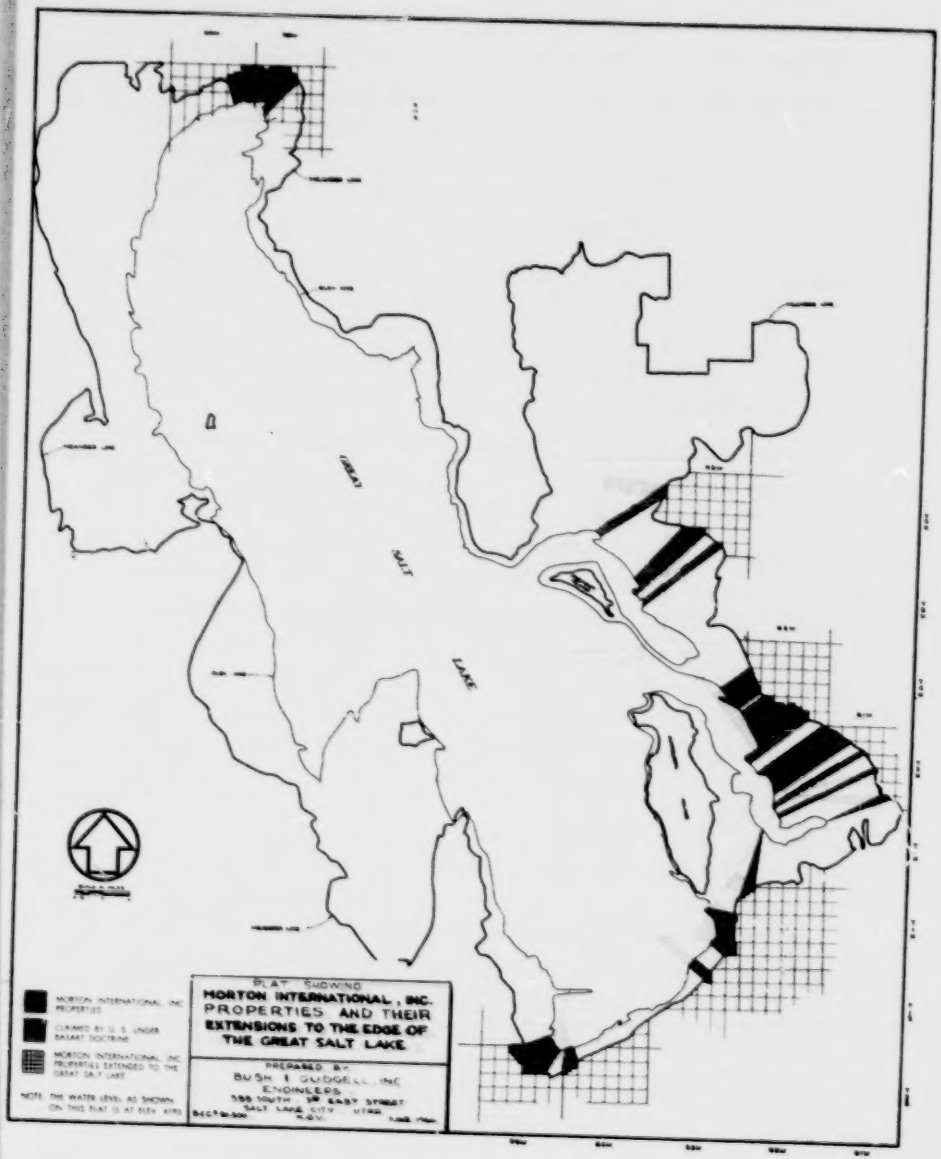
(2) In its answer, the United States denied Utah's allegations of ownership of the lands described in Exhibit A, admitted that the United States claims to own those lands, and prayed for an adjudication confirming and establishing that the United States is the owner of all right, title and interest in those lands. The answer further prayed that the Court declare that the sole right of Utah is "to have these lands conveyed to it by the United States, and to pay for them in accordance with the provisions of the Act of June 3, 1966, as amended." (Answer, p. 3)

(3) As shown on Exhibit A to the complaint, a part of the land claimed by the United States consists of exposed lands (hereinafter referred to as "relicted lands") situated between the present water's edge of the Lake and the surveyed meander line in those areas where the United States owns the land (hereinafter referred to as "uplands") situated above and adjacent to the meander line, and a part consists of relicted lands situated around the Lake where the uplands are owned by private persons. The former relicted lands are referred to as "Public Domain Reliction" and the latter are referred to as "PL Reliction under Basart"[2] on Exhibit A.

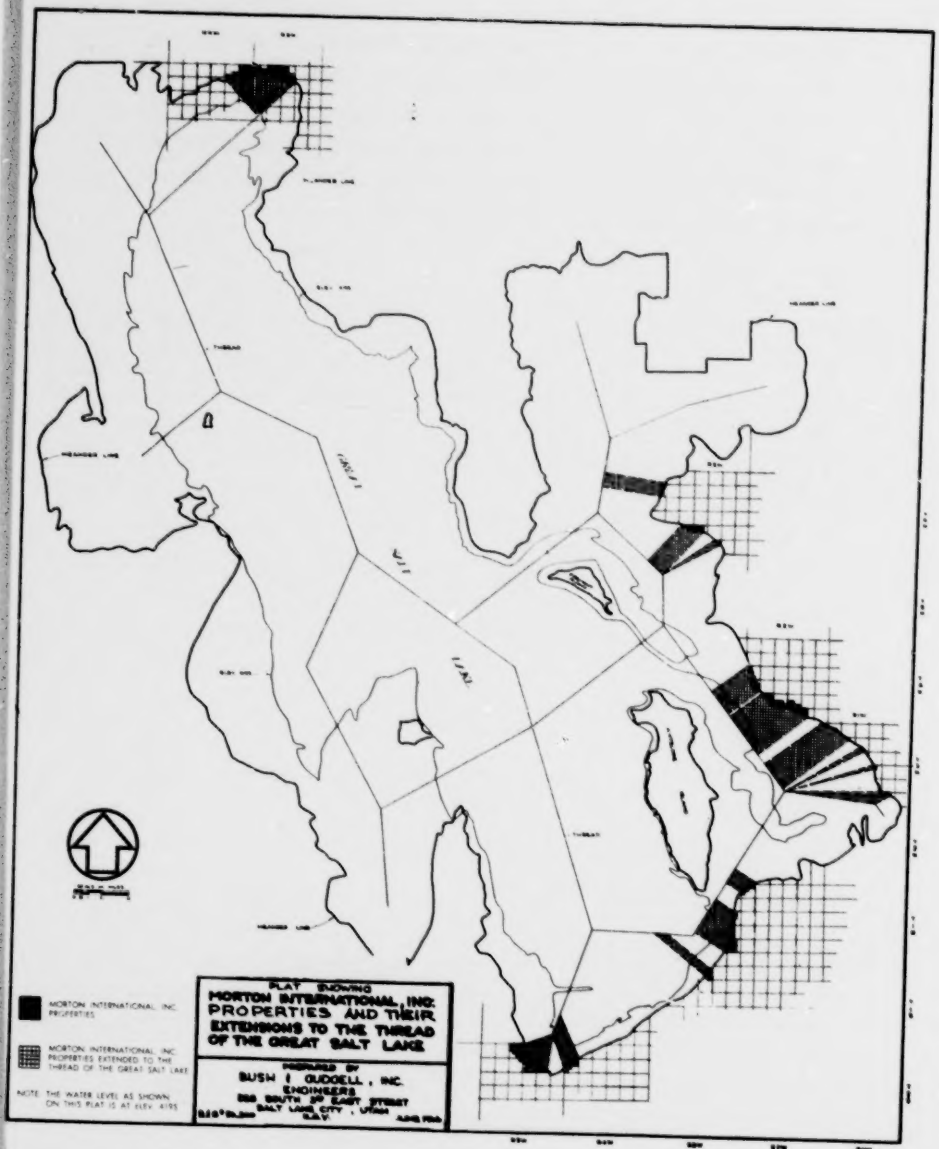
(4) The relicted lands claimed by Morton, shown in crosshatching on the following plat of survey, include a portion of the lands which, in this action, are being claimed both by Utah and the United States. To the extent that the United States' claims can presently be ascertained, that portion is shown in red on the following plat of survey.

---

[2] "Basart" presumably refers to the theory of the administrative decision in *Madison* v. *Basart*, 59 I.D. 415 (1947).


GREAT
SALT
LAKE
MORTON INTERNATIONAL, INC. PROPERTIES
CLAIMED BY U. S. UNDER BASART DOCTRINE
MORTON INTERNATIONAL, INC. PROPERTIES EXTENDED TO THE GREAT SALT LAKE
NOTE: THE WATER LEVEL AS SHOWN ON THIS PLAT IS AT ELEV. 4195
PLAT SHOWING
MORTON INTERNATIONAL, INC.
PROPERTIES AND THEIR
EXTENSIONS TO THE EDGE OF
THE GREAT SALT LAKE
PREPARED BY
BUSH & GUDGELL, INC.
ENGINEERS
SALT LAKE CITY, UTAH

(5) It is Morton's further claim that its title with respect to each tract extends to the thread of the Lake (the lands from the water's edge to the thread of the Lake are hereinafter referred to as "water covered lands"), and that therefore Morton also owns part of the brines and minerals in solution in the Lake. The survey projections delineating Morton's ownership to the various threads of the Lake are shown on the following plat of survey.


MORTON INTERNATIONAL, INC. PROPERTIES
MORTON INTERNATIONAL, INC. PROPERTIES EXTENDED TO THE THREAD OF THE GREAT SALT LAKE
NOTE: THE WATER LEVEL AS SHOWN ON THIS PLAT IS AT ELEV. 4195
PLAT SHOWING
MORTON INTERNATIONAL, INC. PROPERTIES AND THEIR EXTENSIONS TO THE THREAD OF THE GREAT SALT LAKE
PREPARED BY
BUSH & GUDDELL, INC.
ENGINEERS
SALT LAKE CITY, UTAH

(6) Utah has granted leases of relicted lands, *including relicted lands claimed by Morton and the United States,* to various private persons and has granted licenses and permits to said lessees for the extraction of minerals in solution in the waters of the Lake.[3]

Morton's claim of title to the relicted lands is based on its ownership of tracts of uplands, title to which it derived from the United States by virtue of mesne conveyances through patents granted by the United States under authority of Acts of Congress and through the Enabling Act approved July 16, 1894, 28 Stat. 107, which tracts are described and the patents and Acts of Congress are set forth in Exhibit I to Morton's proposed answer. These uplands are riparian to the Lake, and it is Morton's position that under Federal decisional law the grants contained in the government patents conveyed to Morton title to the tracts of relicted lands in front of these uplands.

The basis of Morton's claim of title to the water covered lands and brines and minerals in solution is that, on the date of Utah's admission to statehood, the Lake was not navigable and, therefore, these water covered lands and

---

[3] To protect its rights, Morton has filed suit against Utah and various of its officials and others in the United States District Court for the District of Utah (Civil No. C-127-66) alleging that Utah has taken and deprived it of property without due process of law in violation of the Fourteenth Amendment to the Constitution. Utah filed an answer and counterclaim alleging, among other things, that "the United States owns or claims to own certain interests in the lands and other properties which plaintiff seeks to obtain by its amended complaint, and is therefore an indispensible [sic] party to this action," and that, since the United States has not been made a party to that action, the complaint should be dismissed. All further proceedings in said case have been stayed pending adjudication of the issues in this action.

brines and minerals are Morton's property under Federal decisional law.

The basis of the United States' claim under the so-called Basart doctrine to title to lands claimed by Morton is the administrative decision in *Madison* v. *Basart,* 59 I.D. 415 (1947), in which the Department of Interior ruled that, where a substantial accretion had formed between the meander line and the shore line of the Missouri River by the time of the grant of a patent to a lot of public land abutting on a meander line, title to the accreted land did not pass under the patent.

Despite Utah's theory of navigability set forth in the complaint, it is apparent, as is recognized in Utah's motion to file the complaint, that there are various other theories upon which Utah depends to support its claim to all or part of the property in dispute, *i.e.*:

> (a) the Lake could be held to be navigable and the "mean high water line" fixed substantially below the meander line resulting in a division of the relicted lands between Utah and the upland owners, or
>
> (b) the Lake could be held to be navigable and only relictions existing before statehood be held to be the property of the upland owners, or
>
> (c) the Lake could be held to be navigable with all relicted lands held to be owned by the upland owners to the water's edge wherever it may be from time to time.

Until the Stipulation was entered into by Utah and the United States on March 29, 1968 (See Appendix to Special Master's Report, pp. 67-72), the United States supported Morton's motion to intervene both in oral argument before the Special Master and in a memorandum filed with the

Court[4] on the ground that Morton's claim as an upland fee owner made it an indispensable party. The United States opposed the motion of Great Salt Lake Minerals & Chemicals Corporation ("M & C Corporation") to intervene as a party plaintiff on the ground that its motion was predicated on its interest as a lessee of Utah, which interest was identical to Utah's and adequately represented by Utah.[5]

In view of the United States' opposition to its intervention as a lessee of Utah, M & C Corporation on or about February 19, 1968 filed a Supplemental Motion to Intervene, in the alternative, as a defendant, predicated on its fee ownership of uplands. On February 21, 1968 the United States filed a memorandum in response to M & C Corporation's amended motion in which the United States stated that it did not oppose the intervention for the reason that, as a fee owner, M & C Corporation was in the same position as Morton, *i.e.*, an indispensable party.

Utah has opposed Morton's intervention (as well as M & C Corporation's) on the ground that Utah and the United States have not consented to be sued by Morton.[6]

Upon entering the Stipulation with Utah the United States has taken the position that Morton (and M & C Corporation) was no longer an indispensable party since the Stipulation had eliminated the need to litigate the issue of the United States' Basart claims, although the United

---

[4] Transcript, February 9, 1968, pp. 27-29; Memorandum for the United States, January, 1968, pp. 4-6.

[5] Transcript, February 9, 1968, pp. 24-27.

[6] Contrary to the Special Master's statement, Utah never gave as a reason that it had not consented *to sue* Morton.

States acknowledged that Morton still had a sufficient interest to be joined as a permissive party.[7]

SUMMARY OF ARGUMENT

The recommendations of the Special Master in his Report are primarily based on the doctrine of sovereign immunity, *i.e.*, the lack of consent on the part of Utah *to sue* Morton. Specifically, the Special Master bases each of the following parts of his Report on the purported sovereign immunity of Utah:

> (1) His interpretation of Public Law 89-441 and his recommendation that, subject to the changes indicated, the Stipulation is valid and should be allowed to be filed. (Report, Part V)
>
> (2) His recommendation that Morton's motion to intervene be denied. (Report, Part VI)
>
> (3) His recommendation that Morton is not "indispensable" within the meaning of Rule 19(b) of the Federal Rules of Civil Procedure and that the Court should proceed to adjudicate the controversy in Morton's "compelled" absence. (Report, Part VII)

Since it is apparent from the Special Master's opinion that, were it not for the doctrine of sovereign immunity, Morton's motion to intervene should be granted, we will address ourselves first to this basic issue which has been a fruitful subject of litigation in this Court[8] and a topic

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[7] Transcript, April 26, 1968, pp. 130-131.

[8] *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436 (1834); *Hill* v. *United States*, 50 U.S. (9 How.) 386 (1850); *Langford* v. *United States*, 101 U.S. 341 (1879); *United States* v. *Lee*, 106 U.S. 196 (1882); *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Kawananakoa* v. *Polyblank*, 205 U.S. 349 (1907); *United States* v. *Shaw*, 309 U.S. 495 (1940); *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962).

for discussion by legal writers dating back to Bracton.[9] The doctrine, although frequently critized, is still applied in appropriate cases in this country, but the Special Master's application of it to this case is an unprecedented and unwarranted extension which the Court should not adopt. The foregoing will be shown by development of two points. First, under the common law sovereign immunity is not a bar to the intervention of Morton in this action. Second, by any reasonable construction Utah and the United States each has consented by statute to the intervention of interested persons, such as Morton, in this case.

If sovereign immunity is not applicable, the Special Master's reasoning, which supports his conclusions and recommendations set forth above, must fail and Morton's motion to intervene should be granted.

ARGUMENT

I. UNDER COMMON LAW SOVEREIGN IMMUNITY IS NO BAR TO MORTON'S INTERVENTION IN THIS CASE.

The question is whether a person whose joinder is required within the meaning of the indispensable party doctrine and Rule 19(a) of the Federal Rules of Civil Procedure shall be denied the right to intervene for lack of express statutory consent by one or more sovereigns who are parties to the action. We submit that the law is, and always has been, that he shall not be denied such right.

However, despite the vast number of cases involving sovereign immunity, there are very few decisions which mention this precise question although most courts, includ-

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[9] Bracton, DE LEGIBUS ET CONSUETUDINES ANGLIAE (London, Twiss' ed. 1878).

ing this Court, have properly permitted the intervention.[10] The United States in this case has not asserted sovereign immunity as a bar to Morton's intervention for the reason stated by the Solicitor General during the course of his argument before the Special Master on February 9, 1968:

> "[Mr. Griswold] . . . Now, there is also the basis for which there is great support that, when a sovereign starts a suit to quiet title, it thereby consents to adverse claims."[11]

To explain the basis for permitting intervention in such cases it is necessary to examine the history of the doctrine of sovereign immunity and the status of the common law on the subject at the time of the adoption of the Constitution. The Court was confronted with the problem shortly after the Revolution in the famous case of *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793). This was an original action *in assumpsit* against the State of Georgia by a private citizen of the State of South Carolina. The Court held that such a suit could be maintained with four Justices rendering separate opinions in support thereof. Justices Jay, Blair and Cushing ruled that the constitutional grant of jurisdiction over controversies between a "state and a citizen of another state" permitted such a suit. Justice Wilson completely rejected the doctrine of sovereign immunity stating (2 U.S. at 454):

> "[T]o the Constitution of the United States the term sovereign, is totally unknown."

And continuing (2 U.S. at 457):

> "In this sense, sovereignty is derived from a feudal source; and like many other parts of that system, so

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[10] *Oklahoma* v. *Texas*, 258 U.S. 574 (1922); *Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936); *California* v. *United States*, 180 F.2d 596 (9th Cir. 1950).

[11] Transcript, February 9, 1968, p. 34.

> degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American states."

Both Chief Justice Jay and Justice Cushing raised the question of the right of a citizen to sue the United States, but neither attempted to provide an answer although the Chief Justice indicated his feelings on the subject stating (2 U.S. at 478):

> "I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question."

Justice Iredell wrote the only dissenting opinion with a scholarly examination of the development of the doctrine in England upon which he based his conclusion that sovereign immunity was part of the common law of the several states at the time of this country's independence. Justice Iredell's dissenting opinion, which since the adoption of the Eleventh Amendment has been held to represent *the law*,[12] concludes that the sovereign power with respect to granting or withholding consent to suit resides in the legislature, which consent had not been given by the Legislature of Georgia.

As the leading authority on the status of the common law relating to sovereign immunity, Justice Iredell's opin-

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[12] *United States* v. *Clarke*, *supra*, n. 8; *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); *Hans* v. *Louisiana*, *supra*, n. 8; *Smith* v. *Reeves*, 178 U.S. 436 (1900); *Williams* v. *United States*, 289 U.S. 553 (1933).

ion has a direct bearing on the issue at hand. He states (2 U.S. at 434-435):

> "The principles of law to which reference is to be had, either upon the general ground I first alluded to, or upon the special words I have above cited, from the judicial act, I apprehend, can be, either, 1st. Those of the particular laws of the states against which the suit is brought. Or, 2d. Principles of law common to all the states . . . .
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> "But this point [the particular laws of the state against which the suit is brought], I conceive, it is unnecessary to determine, because I believe there is no doubt that neither in the state now in question, nor in any other in the union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a state, was in being either when the constitution was adopted, or at the time the judicial act was passed. Since that time an act of assembly for such a purpose has been passed in Georgia. But that surely could have no influence in the construction of an act of the legislature of the United States passed before.
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> "The only principles of law, then, that can be regarded, are those common to all the states. I know of none such, which can affect this case, but those that are derived from what is properly termed 'the common law' a law which I presume is the ground-work of the laws in every state of the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each state, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country. The statutes of England that are in force in America differ perhaps in all the states; and, therefore, it is probable the common law in each, is in some respects different. But it is certain that in regard to any common law principle which can influence the question before us no alteration has been made by any statue, which could occasion the least material difference, or have any partial

effect. No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown."

Justice Iredell then proceeds to consider the English law on remedies against the King stating (2 U.S. at 439-440):

"The observations of Lord Somers [in *The Bankers Case*, 14 How. State Trials 1 (1700)], concerning the general remedy by petition to the King, have been extracted and referred to by some of the ablest law characters since; particularly by Lord C. Baron Comyns in his digest. I shall, therefore, extract some of them, as he appears to have taken uncommon pains to collect all the material learning on the subject; and indeed is said to have expended several hundred pounds in the procuring of records relative to that case . . . .

"After citing many authorities, Lord Somers proceeds thus:—'By all these authorities, and by many others, which I could cite, both ancient and modern, it is plain, that if the subject was to recover a rent, or annuity, or other charge from the crown, whether it was a rent or annuity, originally granted by the King; or issuing out of lands, which by subsequent title came to be in the King's hands; in all cases the remedy to come at it was by petition to the person of the King; and no other method can be shown to have been practiced at common law. Indeed, I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff, to recover anything from the King, his only remedy, at common law, is to sue by petition to the person of the King. *I say, where the subject comes as a plaintiff. For, as I said before, when, upon a title found for the King by office, the subject comes in to traverse the King's title, or to show his own right, he comes in the nature of a defendant; and is admitted to interplead in the case with the King in defense of his title, which otherwise would be defeated by finding the office.*'" (Emphasis added)

Thus, Judge Iredell states, on the authority of Lord Somers, at common law in England a person seeking to bring an action against the sovereign was limited to a Petition of Right since an ordinary writ did not lie against the King.[13] The nature of this remedy, developed during the reign of Edward I, is described by Professor Borchard:[14]

> "In the fourteenth Century there was as yet no notion that the king was not responsible for wrongs done his subjects or that he was infallible. On the contrary, the possibility of his doing wrong was freely admitted and an elaborate procedure devised by which the injured subject could invoke relief. The fact that this method of relief was often cumbersome, that it required the king's permission and was surrounded by various safeguards against undue royal burden, does not detract, it is believed, from its essentially legal nature. While it is true that the petition might be refused, thus giving it the color of a supplication for grace, the fact seems to be that petitions were not rejected or dismissed except for strictly legal reasons. Custom had enjoined upon the king the rule of law that a petition founded upon the violation of what practice had developed and characterized as a legal or vested right, should not go unredressed."

However, since the Petition of Right entailed a cumbersome and complicated procedure, another procedure was developed, not requiring consent, in certain cases involving the Crown's interests in real property. This remedy was known as traversing the King's title, which procedure developed by custom and later by statute.[15] A frequent method by which the King obtained title to the property

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[13] Holdsworth, *The History of Remedies Against the Crown*, 38 Law Quarterly Review 141, 143 (1922); Borchard, *Governmental Responsibility in Tort*, 36 Yale L. J. 1, 18 (1926).

[14] Borchard, *supra*, p. 27.

[15] 34 Edw. III, c. 14 (1360); 36 Edw. III, c. 13 (1362).

of his subjects was by holding an inquest upon the death of his tenant, on the lunacy of a subject or on the attainder of a subject for treason or felony, to determine what property that subject held. When the royal officer conducting the inquest found that the subject in question possessed certain property, the King seized it and was said to be entitled by office found. It then developed that a person claiming title to property, which was the subject of an inquest, could enter the proceeding to traverse the facts found by the office in order to show that the King was not entitled to the property or to show his own superior right *(monstrans de droit). The Sadlers' Case*, 4 Co. Rep. 54b, 76 Eng. Rep. 1012 (1588); Holdsworth, *The History of Remedies Against the Crown*, 38 Law Quarterly Review 141, 158 (1922); Borchard, *Governmental Responsibility in Tort*, 36 Yale L.J. 1, 29 (1926).

It would be stating too much to say that the remedies of traverse and *monstrans de droit*, as such, existed in the colonies prior to the Revolution. Their significance, however, lies in the fact that Justice Iredell, on the authority of Lord Somers, considers them to be exceptions to the common law requirement of sovereign consent where a person seeks to enter a proceeding, instituted by the sovereign, as a *defendant* to defend his title rather than suing the sovereign as plaintiff. The terms "plaintiff" and "defendant" are obviously used to merely identify which party has brought the action, and the term "interplead in the case" is used by Lord Somers to describe what we now refer to as intervention.

We submit that the right of a person to intervene to defend his title to property in an action brought by a sovereign is a part of the common law of the states and a part of the decisional law of the United States. The Eleventh Amendment was hurriedly adopted after *Chisholm* v. *Georgia*

to prevent the states from being sued on their obligations in Federal courts, but did not change the common law on the subject of sovereign immunity. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821). It was early decided by the Court that a defendant had a right of recoupment to offset a claim in an action brought against him by the United States. *United States* v. *MacDaniel*, 32 U.S. (7 Pet.) 1 (1833); *United States* v. *Ringgold*, 33 U.S. (8 Pet.) 150 (1834). Subsequently, this Court held in *The Siren*, 74 U.S. (7 Wall.) 152 (1869), that sovereign immunity was no bar to the assertion of a maritime lien against a vessel, which had been seized by the United States as a prize of war, in an action instituted by the United States in the prize court, stating (74 U.S. at 154):

> "But although direct suits cannot be maintained against the United States, nor against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."[16]

Although this Court has held many times that there are no exceptions to the doctrine that a sovereign is immune

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[16] The fact that this case was *in rem* clearly had no bearing on the question of sovereign immunity, contrary to the Special Master's thesis that actions *in rem* are an exception to the rule. (Report, p. 33)

from *direct* suit without its consent,[17] the rule in these

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[17] *United States* v. *Clarke, supra,* n. 8; *The Siren,* 74 U.S. (7 Wall.) 152 (1869); *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47 (1944).

The following cases cited by the Special Master in his Report at page 33 to show that there are certain types of actions where the consent of a sovereign is not a prerequisite to intervention do not support this thesis.

Krippendorf v. *Hyde,* 110 U.S. 276 (1884). An action by creditors to attach debtor's property in the hands of a third party. This third party, whose presence would destroy the Federal court's diversity jurisdiction, attempted to intervene in the action to protect his interest in the attached property. The Court indicated that, in order to prevent the abuse of process (the third party had no adequate legal remedy in the state courts), his intervention would be allowed as his claim would be merely ancillary to the original suit. No sovereign was a party to this action, so consequently the question of immunity from suit or consent was not raised.

Stewart v. *Dunham,* 115 U.S. 61 (1885). An action by creditors to set aside a conveyance of merchandise by their debtor. The action was removed from a state court and Federal jurisdiction based on diversity. After removal additional creditors were allowed to enter the action, and their citizenship would have destroyed diversity if they had joined before removal. The Court held that the lower Federal court had acquired jurisdiction lawfully at the time of removal, so the introduction later of additional creditors did not oust the Court of jurisdiction as this joinder was ancillary to the jurisdiction acquired over the original parties. Neither the United States nor any state was a party to this action, and the question of sovereign immunity or consent was never raised.

Texas v. *Florida,* 306 U.S. 398 (1939). An original action in the nature of a bill of interpleader by the State of Texas against the States of Florida, New York, and Massachusetts and against several individuals to determine the true domicile of a decedent due to rival claims by those four states for death taxes. There was no attempt by any person to intervene in this action, and no mention was made by the Court of either sovereign immunity or consent to be sued.

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decisions has not been applied to the intervention of an interested party in a case such as this. *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), was a suit in equity brought in this Court by the State of Oklahoma against the State of Texas to settle a dispute over their common boundary along the Red River and over title to the river bed. The United States intervened claiming title to the river bed as against both states. The disputed area contained valuable oil and

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New Jersey v. *New York*, 345 U.S. 369 (1953). An original action by the State of New Jersey against the State of New York and New York City for injunctive relief against diversion of waters of the Delaware River. The Commonwealth of Pennsylvania petitioned for leave to intervene *pro interesse suo*, and it was granted. This action was initiated in 1929 and a decree was rendered in 1931 enjoining the defendants from diverting more than a prescribed amount of water from the river. This decree also stated that any of the parties to this action could apply for further relief at any time with regard to the subject matter in controversy. In 1952 the City of New York applied for such additional relief. New Jersey and Pennsylvania filed answers opposing such relief, and the matter was referred to a Special Master. In December of 1952 the City of Philadelphia filed a motion for leave to intervene. This Court stated that it was unnecessary to decide whether Philadelphia's intervention was in violation of the Eleventh Amendment. It was indicated that, if Philadelphia were allowed to intervene, there would be other cities along the Delaware River that would also insist upon a right to intervene. The Supreme Court stressed that its original jurisdiction should not be expanded to the dimensions of an ordinary class action, when the interest of a member of that class who desires to intervene is already properly represented by his state which is a party to the action. In order to allow such an intervention the intervenor must show some compelling interest in his own right, apart from his interest in a class with all other citizens of the state. Philadelphia could not show such an interest, and, consequently, its motion for leave to intervene was denied. The Court does not discuss sovereign immunity or consent *vis-a-vis* intervention.

Oklahoma v. *Texas*, *supra*, n. 10. This case is discussed above.

gas bearing strata and the situation evidently became chaotic. In the Court's words "it developed . . . that possession of parts of the bed was being taken and held by intimidation and force; that in suits for injunction the courts of both states were assuming jurisdiction over the same areas; that armed conflicts between rival aspirants for the oil and gas had been but narrowly adverted and still were imminent; that the militia of Texas had been called to support the orders of its courts, and an effort was being made to have the militia of Oklahoma called for a like purpose. . . ." (258 U.S. at 579-580)

In these circumstances to preserve public tranquility and prevent waste the United States, Oklahoma and Texas agreed to the appointment of a receiver by the Court to administer the area pending adjudication of title. Thereafter, numerous private parties claiming title to portions of the disputed property were permitted by this Court to intervene, many of which claims "conflict one with another *and all are in conflict with the claims of one or more of the three principal litigants.*" (258 U.S. at 581; emphasis added) These claimants were obviously indispensable parties, and there was no statutory consent on the part of any of the sovereigns to their intervention. Their right to intervene without consent was assumed by the Court. Contrary to the Special Master's assertion on page 33 of his Report, this was not an action *in rem* but a suit to quiet title just as this suit is. A quiet title action is characterized as being *quasi in rem*,[18] but, in any event, the type of action, whether *in personam*, *in rem* or *quasi in rem*, clearly has no bearing on the issue of sovereign immunity. *The Siren, supra.*

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[18] *Prudential Ins. Co. of America* v. *Zimmerer*, 66 F. Supp. 492 (D.C. Neb 1946); *Humble Oil and Refining Co.* v. *Sun Oil Co.*, 191 F.2d 705 (5th Cir 1951); 74 C.J.S. *Quieting Title* § 7 (1951).

At least one court has stated the rationale for permitting the intervention of interested parties without statutory consent. *California* v. *United States,* 180 F.2d 596 (9th Cir. 1950), involved an action by the United States to quiet title to waters wholly within California against a lessee of the State of California which was diverting a portion of the water for irrigation purposes. California moved to intervene as owner of the water, the denial of which motion was reversed by the court of appeals stating (180 F.2d at 602):

> "The Government also makes the contention that this is a suit against the Government and, there being no statute authorizing it, the Court does not have jurisdiction. The short answer to that is that the Government chose the forum in which it is seeking to quiet title to the water. The State is asserting an interest in the subject matter as absolute owner of the water, and as *parens patriae* on behalf of all of its citizens. This is a sufficient interest in the subject matter to entitle it to be heard, just as if the State were joined by the United States originally as a defendant."

In the widely-quoted case, *Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936), the court, reversing the decree in a quiet title action, directed the trial court to permit the intervention of the States of Washingon and Oregon on the ground that the order denying intervention deprived these states of any effective remedy for the adjudication of title because the United States had not consented to a subsequent suit against it. Clearly, these courts, without discussing the issue further, are applying the exception to the requirement of sovereign consent under the common law as Lord Somers and Justice Iredell stated it to be, *i.e.*, the right to come in "in the nature of a defendant . . . in defense of his title."

Utah has adopted the common law of England,[19] and there is no Utah decision which supports the Special Master's conclusions with respect to sovereign immunity in this case. Indeed, the Utah Supreme Court has recently stated in *Nestman* v. *South Davis County Water Improvement Dist.*, 16 Utah 2d 198, 201, 398 P. 2d 203, 204 (1965):

> "We have no disposition nor desire to extend it [sovereign immunity] any further than its already established application."

The doctrine is not a popular one, to say the least, and it has been found obnoxious to the principles of justice by many authorities.[20] This Court has more recently recognized that the doctrine is in disfavor[21] and that there exists a trend toward relaxing its rigors wherever possible.[22] If this Court adopts the Special Master's conclusions, it would be a step in the opposite direction for no justifiable purpose.

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[19] Utah Code Annotated, Section 68-3-1. "The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state."

[20] *Chisholm* v. *Georgia, supra,* n. 8; *United States* v. *Lee, supra,* n. 8; Laski, *The Responsibility of the State in England,* 32 Harv. L.R. 447 (1919); Borchard, *supra,* n. 13 at 798-807; *Kennecott Copper Corporation* v. *State Tax Commission,* 327 U.S. 573, 580 (1946) (Justice Frankfurter, dissenting); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity,* 13 La. L.R. 476, 492-494 (1953).

[21] *Davis* v. *Pringle,* 268 U.S. 315 (1925); *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U.S. 381 (1939); *Federal Housing Administration* v. *Burr,* 309 U.S. 242 (1940); *National City Bank of New York* v. *Republic of China,* 348 U.S. 356 (1955).

[22] *United States v. Shaw, supra,* n. 8.

II. UTAH AND THE UNITED STATES HAVE CONSENTED BY STATUTE TO MORTON'S INTERVENTION.

Assuming, *arguendo,* that statutory consent is required for Morton's intervention, Utah has consented by virtue of Section 78-11-9, Utah Code Annotated. This statute provides:

> "*State of Utah party defendant in certain suits*—Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought *in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto,* or to foreclose mortgages or other liens thereon *or to determine any adverse claim thereon,* or secure any adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved. It shall be the duty of the attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this section nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof." (Emphasis added)

Utah argued that Section 78-11-9 has been repealed by implication by the Utah Governmental Immunity Act, Sections 63-30-1, *et seq.,* Utah Code Annotated, effective July 1, 1966. The Special Master, while conceding the correctness of Morton's argument that Section 78-11-9 has not been repealed, states that it is not applicable on the basis that "In my opinion the consent to be sued granted by the Utah Legislature in that section does not encompass the consent to the intervention of anyone as a party defendant in a suit brought by the State of Utah or the authority to sue anyone. Nor is it to be construed as such." (Report,

p. 37) The Special Master thus adheres to the formalistic approach, which he uses in labeling actions *in personam* or *in rem*, in determining a party's rights by whether he is designated *plaintiff* or *defendant*. He then reasons that, since the title of the statute uses the term *defendant* when referring to Utah, it necessarily excludes prosecuting of adverse claims against Utah in any action in which Utah appears as plaintiff. This reasoning completely ignores the text of the statute which has no such limitation and speaks in terms of Utah being named "a party" in any pending or subsequent action for the recovery of property or "to determine any adverse claim thereon."

Such reliance on form over substance in the designation of a party has been rejected by this Court. *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902); *Ford Motor Company* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945). In *Ford Motor Company*, this Court stated (323 U.S. at 464):

> "We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."

Utah supports this view stating (Brief in Opposition to Morton's Motion, p. 4):

> "It makes no difference that Morton in *form* seeks simply to intervene as a defendant and to merely 'answer' the complaint of the State of Utah when in truth and fact the real substance of the answer proposed by Morton is a denial of the title claimed by the State of Utah and a claim by Morton of ownership in itself to the same lands. The nature of Morton as a party must be determined by the essential nature and effect of the position Morton occupies in the proceeding, rather than by the formal designation of Morton as a defendant."

The United States has taken a similar position.[23]

Actually, there is no support in any authority which we have been able to locate for the Special Master's opinion that Morton's intervention is barred because Utah has not consented *to sue* Morton. This reasoning would, of course, negate the requirements of joinder as determined by this Court under the indispensable party doctrine and Rule 19(a) of the Federal Rules of Civil Procedure in actions brought by sovereigns. In such a case, if the sovereign does not see fit to join an interested person whose joinder would ordinarily be required, the only course left for the Court is to decide whether to proceed without him on the ground that the sovereign's interests are paramount, as the Special Master urges here, or to dismiss the action. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968). On what basis, either historically or in the interest of justice, can the doctrine of sovereign immunity be stretched to achieve the foregoing result? To state the question is to answer it—there is none.

The Special Master agrees, at page 34 of the Report, with the positions taken by Morton and the United States[24]

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[23] (Solicitor General Griswold) "As far as I see it, it is irrelevant and immaterial whether they [Great Salt Lake Minerals & Chemicals Corporation] seek to intervene as a plaintiff or a defendant. They can be aligned as it fits the situation and the alignment can be changed if the circumstances change, and I don't see that affects the jurisdiction at all." (Transcript, February 9, 1968, pp. 81-2)

[24] "Section 5 of the Act provides that the State of Utah 'may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States' in the lands below the meander line of the Lake. The purpose of this determination is to fix the liability, if any, of the State toward the United States for these lands which are to be relinquished to the State. Yet, if there are other claimants,

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that under the provisions of Public Law 89-441 the United States has consented to the joinder of other defendants since Section 5(b) of the Act provides that:

> "Consent is given to join the United States as *a* defendant in this action." (Emphasis added)

He does, however, qualify this by stating that, if Morton's motion is interpreted as also seeking leave to file a cross-claim against the United States, it should be denied for it would be suing the United States without "Constitutional authority." The basis for this is that the prayer for relief in Morton's answer states that the United States is without any right or title to the relicted lands and bed of the Lake claimed by Morton. Obviously, however, Morton is defending its title against the Basart claims of the United States, which it clearly has the right to do. It would, indeed, be difficult for a person to defend his title unless he could challenge the title of the person claiming against him.

III. MORTON'S JOINDER AS A PARTY IS REQUIRED UNDER RULE 19(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Under the respective claims and prayers for relief in the complaint and answer each party is seeking an adjudication quieting title in it to the lands, brines and minerals

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besides Utah, it is obvious that the title of the United States cannot be determined without adjudicating those claims as well. Nor is the United States entitled to payment for the lands if the true owners are the private claimants. Thus, it seems plain that the object of the suit will be frustrated unless all claims adverse to the United States are now adjudicated. In these circumstances, we submit the jurisdictional act must be construed as permitting, by necessary implication, the assertion and disposition of all claims of ownership with respect to the lands disputed between the State and the United States." (Reply Memorandum for the United States, pp. 4-5)

described in Section 2 of Public Law 89-441.[25] Assuming, for the moment, that the Stipulation between the United States and Utah is valid and will be carried out by the parties, the fact remains that the United States and Utah each claims lands, brines and minerals which are also claimed by Morton, and in order to determine the right, title and interest of the United States in the lands conveyed pursuant to the Act, the Court will have to determine whether Morton or the United States owns the lands, brines and minerals in dispute between them. Only after this is accomplished will the Secretary of Interior be able to comply with Section 5(b) of the Act to determine the fair market value of the lands and minerals conveyed.

The Stipulation does not alter either party's claims to the subject matter in dispute and, apart from its invalidity as shown in Point IV, the Stipulation is merely an agreement between counsel for the parties, not binding on Morton, as to how they will proceed during the course of the litigation. This agreement could be rescinded at any time by mutual consent of the parties.

Since title to property claimed by Morton will be adjudicated by the Court as between Utah and the United States, Morton is a person who "shall" be joined as a party, if feasible, under Rule 19(a)[26] and whose intervention is

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[25] ". . . all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State, as duly surveyed heretofore or in accordance with section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake . . . ."

[26] "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined

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required under Rule 24(a).[27] This Court developed the indispensable party doctrine in a long line of decisions which established the criteria for determining when an absent person must be joined if an action is to proceed.[28] The rule was set forth in the leading case of *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1855), as follows (58 U.S. at 139):

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that

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as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

[27] "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[28] *Barney* v. *Baltimore*, 73 U.S. (6 Wall.) 280 (1868); *Williams* v. *Bankhead*, 86 U.S. (19 Wall.) 563 (1874); *Kendig* v. *Dean*, 97 U.S. 423 (1878); *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *Washington* v. *United States, supra*, n. 10; *McShan* v. *Sherrill*, 283 F.2d 462 (9th Cir. 1960); *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961).

> interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

We do not understand the decision of this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra,* to change this rule, but, on the contrary, it clearly adheres to it. The Court did reverse the court of appeals for not using a pragmatic approach in determining whether an absent person must be joined as a party. It adopted the standards set forth in Rule 19(a) relating to the interest of the outsider, *i.e.* (88 S. Ct. at 738):

> "[T]he Court must consider the extent to which the judgment may 'as a practical matter impair or impede his ability to protect' his interest in the subject matter."

Applying this criterion to Dutcher, the outsider, the Court stated (88 S. Ct. at 737):

> "We may assume, at the outset, that Dutcher falls within the category or [sic] persons who, under §(a), should be 'joined if feasible.' The action was for an adjudication of the validity of certain claims against a fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him."

Applying Rule 19(a) to Morton:

(1) In Morton's absence complete relief cannot be accorded among those already parties. Obviously, the validity of the Basart claims cannot be adjudicated in Morton's absence, otherwise the United States and Utah would not

have resorted to the device of the Stipulation in an attempt to avoid this issue.

(2) Morton claims a *direct* interest in the subject matter of the action as follows:

(a) The Basart lands.

(b) The submerged lands, *all of which* are claimed by both Utah and the United States.

(c) Brines and minerals in solution, *all of which* are claimed by both Utah and the United States. We are aware of no case in which title to the brines or minerals in solution in a non-navigable body of water has been allocated among the riparian owners, and this complex problem is one which the Court may well have to resolve. In any event, no such decision should be made without the participation of all claimants thereto. *California* v. *United States, supra.*

(d) Revenues collected by Utah from leases and mineral extraction licenses granted by Utah with respect to property claimed by Morton, the disposition of which proceeds will be determined by this litigation pursuant to Section 6 of Public Law 89-441 which provides:

> "If the question of the title to the United States is litigated as authorized in section 5(b) of this Act, and it is determined that the United States has no right, title and interest in lands from which revenues have been derived and paid to the United States pursuant to this section, the revenues paid to the United States shall be returned to the State of Utah without interest."

(3) The disposition of the action in Morton's absence will, as a practical matter, impair or impede Morton's ability to protect that interest. An adjudication of title in Morton's absence, although not technically binding on Morton, will affect Morton's interest by placing a cloud on

its title which it, in all probability, could not remove. *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895); *Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936). Referring again to the *Provident* case, Dutcher had not sought to intervene prior to trial and it was not until the matter had gone to judgment and appeal, after years of litigation, that the court of appeals dismissed for lack of an indispensable party. In this case, which is in its initial stages, it is apparent that property, whether land, brine, minerals or money, claimed by Morton will be disposed of as a result of the Court's decree, regardless of whether or not the Stipulation can be carried out. Accordingly the disclaimer in Section 6 of the Stipulation as to the effect of a judgment on the title of third parties claiming lands, brines or minerals is meaningless. Pursuant to Section 3 of Public Law 89-441, the United States has expressly reserved all mineral rights, except as to brines and minerals in solution, in the lands conveyed to Utah under Section 2 and this includes the Basart lands. In any suit brought by Morton against Utah, assuming consent on the part of Utah, to test the title to the Basart lands, the United States, due to this reservation, would be required to be joined and it could not be joined without its consent. Thus, any attempt by Morton to litigate its title would undoubtedly be fruitless.

In view of the foregoing, the Special Master's statement, at page 45 of his Report, that Morton's "sole interest in the subject matter of this action is a common question of law and fact" is plainly incorrect. The Special Master does recognize, however, that Morton, unless permitted to intervene in this action, "has no forum . . . to litigate those questions of law and fact," but he qualifies this by the clause "*absent the interference of either sovereign with Morton's quiet enjoyment of the relicted land fronting its uplands.*"

(Emphasis added) We do not understand what the Special Master means by this qualifying statement, unless it is intended to buttress his subsequent statement that "In any event, Morton is in no wise worse off now than before this action was instituted." Of course such is not the case, and furthermore Morton's "quiet enjoyment of the relicted land" is being interfered with since Utah has taken and leased these lands to other private parties, which leases are sanctioned by the United States pursuant to Section 6 of Public Law 89-441.

Since Morton's joinder will not deprive the Court of jurisdiction of the subject matter of the action, contrary to the Special Master's opinion, because the doctrine of sovereign immunity does not apply, its joinder is required under Rule 19(a) and it has a right to intervene pursuant to Rule 24(a). If, however, the Court should find that Morton's joinder is not feasible, we submit that it would not be equitable and in good conscience to proceed with the litigation merely because the parties are sovereigns and Morton is a private person, as urged by the Special Master. In such event, the action should be dismissed or, in the alternative, Utah be granted leave to amend its complaint naming Morton and other interested private persons defendants as well as the United States.

IV. MORTON'S INTERVENTION IS REQUIRED UNDER PUBLIC LAW 89-441 AND THE STIPULATION IS INVALID.

The Special Master's interpretation of Public Law 89-441 in Part V of his Report is premised primarily on the sovereign immunity of Utah. From this premise thereafter everything falls in sequence like a line of dominoes, *i.e.*, the Stipulation is valid under the Act, by reason of the

Stipulation Morton's rights are no longer being affected and therefore Morton is not an indispensable party. Essentially, it is the Special Master's view that it must be assumed that Congress was aware that interested private persons could not be joined without the consent of Utah and so the Act must be construed to permit only an adjudication of part of the property in dispute. The statutory language, however, is plain and unambiguous and there is no need for such tortuous construction since, as we have pointed out, the doctrine of sovereign immunity is not applicable. Even if the doctrine were applicable, no such construction would be necessary since Utah is perfectly free to sue Morton and any other interested persons in addition to the United States.

Section 2 of the Act in pertinent part provides:

> "Subject to the other provisions of this Act, the Secretary of the Interior shall by quitclaim deed convey to the State of Utah *all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State,* as duly surveyed heretofore or in accordance with section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake: *Provided, however,* That the provisions of this Act shall not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below said meander line, ..." (Emphasis added)

The United States having quitclaimed all its right, title and interest in the lands, brines and minerals, Utah is given an option under Section 5 to elect whether to pay the fair market value thereof as determined by the Secre-

tary, pursuant to subsection 5(a), or pursuant to subsection 5(b):

> "[The State] may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act. Consent to join the United States as a defendant to such an action is hereby given. Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value, as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of this Act *as may be found by the court* to have been the property of the United States prior to the conveyance. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determination, the conveyance authorized by section 2 of this Act shall be null and void." (Emphasis added)

Thus, the Act requires a judicial determination of all that the United States claims to own in lands, brines and minerals lying below the meander line of the Lake which have been conveyed to Utah, including the Basart claims. If, in fact, it is held that the United States had no title to the Basart lands but that these lands are owned by others such as Morton, these lands are not covered by the conveyance and Utah need not pay for them. Since Congress did not consent to an adjudication of only a portion of the United States' title claims, this Court cannot exercise jurisdiction over the limited action contemplated by the Stipulation.[29] *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436 (1834).

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[29] This was the position taken by the United States prior to the Stipulation at the hearing before the Special Master on February 9, 1968:

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The proviso in Section 2 of the Act is stressed by the Special Master as indicating an intention on the part of Congress to exclude private persons from the litigation, but actually the converse is true. The Special Master is in error when he states that the proviso provides "that a decision of this Court or any other action taken pursuant to the Act shall have no direct bearing on the valid existing rights of third persons." (Report, p. 21) Actually, the proviso merely states explicitly what Congress could not do in any event. Congress cannot merely by legislative action impair a person's property rights since this would be a deprivation of property "without due process of law" prohibited by the Fifth Amendment. *Union Pacific Railroad Co.* v. *United States,* 99 U.S. 700 (1879); *Choate* v. *Trapp,* 224 U.S. 665 (1911). Furthermore, if the Act could be construed as denying a person the right to protect the validity of his title or his property interest through intervention, it would undoubtedly be unconstitutional. This litigation was authorized under the Act "to secure judicial determination of the right, title and interest of the United States" in the property in dispute. Since part of the property in dispute is claimed by private persons, which

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MR GRISWOLD: "As I have thought about this problem over the last two weeks, there have been times when it seems to me that a solution might be if Utah would be willing to amend its bill so as to make it applicable only as to such areas of land, and it might have to specify them by metes and bounds, which might be an enormous task, only as to such land as to which there was no other claim, thus narrowing the case to the areas which are vast, where the sole issue is between the United States and the State of Utah. And that would eliminate all questions of other, or indispensable, parties.

"But I am afraid that that just wouldn't comply with the Statute as Congress has enacted it." (Transcript, February 9, 1968, p. 29)

claims both Utah and the United States assert are invalid, such persons must of necessity be permitted to intervene or their interests and rights *will* be affected contrary to the proviso of Section 2.

The Stipulation is also invalid in that the agreements to convey and the conveyances provided for are beyond the power of the Solicitor General. The Solicitor General, pursuant to the Stipulation, has agreed:

> "5. Should the State establish its own superior title as against the United States to the uncovered lands indicated on the attached map as 'public domain reliction lands,' the United States, without further contest in this or any other proceeding, shall abandon any claim as against the State to ownership, prior to June 15, 1967, of the uncovered lands indicated on the attached map as 'public land reliction under *Basart*,' and shall acknowledge that the State owes nothing to the United States on account of the conveyance of such lands under Public Law 89-441."

In other words, the Solicitor General is agreeing, purportedly on behalf of the United States, that the United States will convey the Basart lands to Utah without compensation if Utah should sucessfully show that it has title to "public domain reliction lands." There is nothing in the Act, however, which can possibly be construed to delegate to the Solicitor General (or to anyone else in the Executive Branch of the Government) the authority to make such an agreement, nor to relinquish Federal rights in lands without compensation unless and until such lands have been determined by the Court, pursuant to the Act, not to have been owned by the United States.

As we have previously pointed out, this litigation will not necessarily result in an all-or-nothing decision predicated on navigability or non-navigability. If, for example, the

Lake is held to be navigable and the "mean high water line" is fixed by the Court substantially below the meander line, it will result in a division of the relicted lands, both public domain reliction and Basart, between Utah and the upland owners. In such case, the Basart lands coveyed by the United States to Utah for nothing pursuant to the Stipulation would have significant value.

Accordingly, the agreement to relinquish Federal rights is invalid and the conveyance of such lands would be void. As stated by this Court in *Sioux Tribe of Indians* v. *United States,* 316 U.S. 317, 326 (1942):

> "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority."

CONCLUSION

For the reasons set forth in support of its exceptions to the Special Master's Report, Morton submits that its motion to intervene should be granted.

Respectfully submitted,

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December, 1968.

CERTIFICATE OF SERVICE

I, Frank A. Wollaeger, one of the attorneys for Morton International, Inc. and a member of the Bar of this Court, do hereby certify that copies of the foregoing Exceptions to Report of Special Master and Supporting Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, Utah 84114; and Raymond T. Senior, Senior & Senior, 10 Exchange Place, Salt Lake City, Utah 84111, counsel for Great Salt Lake Minerals & Chemicals Corporation, by having the same delivered to their respective offices, in accordance with Rule 33 of the Rules of this Court.

FRANK A. WOLLAEGER
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